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March 21 1894



**CASES ON CONSTITUTIONAL LAW.**

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CASES  
ON  
CONSTITUTIONAL LAW.

*WITH NOTES.*

PART ONE.

BY  
JAMES BRADLEY THAYER, LL.D.  
WELD PROFESSOR OF LAW AT HARVARD UNIVERSITY.

CAMBRIDGE:  
CHARLES W. SEVER.  
1894.

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Mrs. Edward Channing<sup>B</sup>

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## PREFATORY NOTE TO PART ONE.

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THE pages which follow constitute the first part of a collection of cases on Constitutional Law, in two volumes, which will be published as soon as may be during the current year. This collection is made primarily for the use of my own classes at the Harvard Law School. I hope that it may also prove useful elsewhere; indeed, the present fragment of the collection is now printed in advance of the rest, in order to meet the immediate requirements of my friend Professor Blewett Lee, of the Law Department of the Northwestern University at Chicago.

If it should seem that these earlier pages contain an undue amount of preliminary and illustrative matter, the reader is asked to remember that they are only the beginning (something less, perhaps, than a quarter) of the more considerable collection above named, and that in the pages which are to follow there will be comparatively little occasion for inserting such additions.

As a rule arguments of counsel are omitted without mention. Other omissions are indicated.

JAMES BRADLEY THAYER.

CAMBRIDGE, MASSACHUSETTS,  
March 15, 1894.





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# CASES ON CONSTITUTIONAL LAW.

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## PART I.

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### CHAPTER I.

#### CONSTITUTIONS OF GOVERNMENT.—THE THREE DEPARTMENTS.— THE OFFICE OF THE JUDICIARY.

#### SECTION I.

##### PRELIMINARY.

A CONSTITUTION has been well defined as “L'ensemble des institutions et des lois fondamentales, destinées à régler l'action de l'administration et de tous les citoyens.”<sup>1</sup> It is often, as in England, an unwritten body of custom, though, since the assertion of the “rights of man” which preceded the French Revolution, the written enactment of such fundamental principles has been not uncommon, as well on the European continent as in America. A written constitution usually contains provisions which make innovation less easy than in the case of customary constitutions, such as that of England, any part of which may be modified by an ordinary Act of Parliament.<sup>2</sup>—HOLLAND, *Elem. Jurisp.* (6th ed.) 323.

In every form of government (πολιτεία) there are three departments (μόρια), and in every form the wise law-giver must consider, what, in respect to each of these, is for its interest. If all is well with these, all must needs be well with it, and the differences between forms of government are differences in respect to these. Of these three, one is the part which deliberates (τὸ βουλευόμενον)<sup>3</sup> about public affairs; the second

<sup>1</sup> Ahrens, *Cours*, iii. p. 380.

<sup>2</sup> Ahrens, *Cours*, iii. p. 381. Mr. Bryce has suggested the use of the terms “rigid” and “flexible” to express this distinction. See Dicey, *Law of the Constitution*, p. 84, and Professor Dicey's own instructive and ingenious applications of the distinctions, *ib.* pp. 114–125.

<sup>3</sup> The Greek legislature of the present day, a single chamber, is called The Boulè.  
—ED.

is that which has to do with the offices . . . ; and the third is the judicial part (τὸ δικάζον). — ARISTOTLE, *Politics*, book vi. c. xiv.

Il y a dans chaque État trois sortes de pouvoirs : la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil.

Par la première, le prince ou le magistrat fait des lois . . . et corrige ou abroge celles qui sont faites. Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établie la sûreté, prévient les invasions. Par la troisième, il punit les crimes, on juge les différends des particuliers. On appellera cette dernière la puissance de juger, et l'autre simplement la puissance exécutrice de l'État. . . .

Lorsque dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté ; parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement.

Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens seroit arbitraire : car le juge seroit législateur. Si elle étoit jointe à la puissance exécutrice, le juge pourroit avoir la force d'un oppresseur.

Tout seroit perdu si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçoient ces trois pouvoirs : celui de faire des lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers. — MONTESQUIEU, *L'Esprit des Loix*, livre xi. c. vi. (1748).<sup>1</sup>

Le corps politique a les mêmes mobiles : on y distingue de même la force et la volonté ; celle-ci sous le nom de *puissance législative*, l'autre sous le nom de *puissance exécutive*. Rien ne s'y fait ou ne s'y doit faire sans leur concours.

Nous avons vu que la puissance législative appartient au peuple, et ne peut appartenir qu'à lui. Il est aisé de voir, au contraire, par les principes ci-devant établis, que la puissance exécutive ne peut appartenir à

<sup>1</sup> It may be confidently laid down, that neither the institution of a Supreme Court, nor the entire structure of the Constitution of the United States, were the least likely to occur to anybody's mind before the publication of the "*Esprit des Loix*." We have already observed that the "*Federalist*" regards the opinions of Montesquieu as of paramount authority, and no opinion had more weight with its writers than that which affirmed the essential separation of the Executive, Legislative, and Judicial powers. The distinction is so familiar to us, that we find it hard to believe that even the different nature of the Executive and Legislative powers was not recognized till the fourteenth century ; it occurs in the *Defensor Pacis* of the great Ghibelline jurist, Marsilio da Padova (1327), with many other curious anticipations of modern political ideas, but it was not till the eighteenth that the "*Esprit des Loix*" made the analysis of the various powers of the State part of the accepted political doctrine of the civilized world. — MAINE, *Popular Government*, 218. — ED.



la généralité comme Législatrice ou Souveraine ; parce que cette puissance ne consiste qu'en des actes particuliers qui ne sont point du ressort de la loi, ni par conséquent de celui du Souverain, dont tous les actes ne peuvent être que des lois.

Il faut donc à la force publique un agent propre qui la réunisse et la mette en œuvre selon les directions de la volonté générale, qui serve à la communication de l'État et du Souverain, qui fasse en quelque sorte dans la personne publique ce que fait dans l'homme l'union de l'ame et du corps. Voilà quelle est dans l'État, la raison du gouvernement, confondu mal à propos avec le Souverain, dont il n'est que le ministre.

Qu'est-ce donc que le Gouvernement ? Un corps intermédiaire établi entre les sujets et le Souverain pour leur mutuelle correspondance, chargé de l'exécution des lois, et du maintien de la liberté, tant civile que politique. . . .

J'appelle donc *Gouvernement* ou suprême administration l'exercice légitime de la puissance exécutive, et Prince ou magistrat l'homme ou le corps chargé de cette administration. — ROUSSEAU, *Du Contrat Social*, livre iii. c. i. (1762).

Le principe de la vie politique est dans l'autorité Souveraine. La puissance législative est le cœur de l'État, la puissance exécutive en est le ceryeau, qui donne le mouvement à toutes les parties. Le cerveau peut tomber en paralysie et l'individu vivre encore. Un homme reste imbécile, et vit : mais sitôt que le cœur a cessé ses fonctions, l'animal est mort. — *Ib.* c. xi.

In all tyrannical governments, the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men ; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us, therefore, in England, this supreme power is divided into two branches: the one legislative, to wit, the Parliament, consisting of king, lords, and commons ; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British Parliament, in which the legislative power, and (of course) the supreme and absolute authority of the State, is vested by our constitution. — 1 *Blackst. Com.* (1st ed.) 142 (1765).<sup>1</sup>

The original power of judicature, by the fundamental principles of society, is lodged in the society at large : but as it would be impracti-

<sup>1</sup> At p. 52 Blackstone had already remarked : " I proceed to observe that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any State resides, it is the right of that authority to make laws." — Ed.

cable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He therefore has alone the right of erecting courts of judicature; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws,<sup>1</sup> it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary that courts should be erected, to assist him in executing this power; and equally necessary that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the Crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers. — *Ib.* 266, 267.

Two features have at all times since the Norman Conquest characterized the political institutions of England.

The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. This authority of the State or the nation was, during the earlier periods of our history, represented by the power of the Crown. The king was the source of law and the maintainer of order. The maxim of the courts, "Tout fuit in luy et vient de lui al commencement," was originally the expression of an actual and undoubted fact. This royal supremacy has now passed into that sovereignty of Parliament which has formed the main subject of the foregoing chapters.

The second of these features, which is closely connected with the first, is the rule or supremacy of law. This peculiarity of our polity is well expressed in the old saw of the courts, "La ley est le plus haute inheritance, que le roy ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inheritance sera." — *DICEY, Law of the Const.* (4th ed.) c. iv. 173.

It has been already pointed out that in many countries, and especially in France, servants of the State are in their official capacity to a great extent protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject to official law, administered by official bodies. This scheme of so-called administrative law is opposed to all English ideas, and by way of contrast admirably illustrates the full meaning of that rule of law which is an essential characteristic of our constitution. . . .

The term *droit administratif* is one for which English legal phraseology supplies no proper equivalent. The words "administrative law," which are its most natural rendering, are unknown to English

<sup>1</sup> He could not agree that the judiciary, which was part of the executive, should be bound to say that a direct violation of the constitution was law. — *Gouverneur Morris*, 5 Ell. Deb. 429. — Ed.

judges and counsel, and are in themselves hardly intelligible without further explanation.

This absence from our language of any satisfactory equivalent for the expression, *droit administratif*, is significant; the want of a name arises at bottom from our non-recognition of the thing itself. In England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law, and the very principles on which it rests, are in truth unknown. . . .

*Droit administratif*, or "administrative law," has been defined by French authorities in general terms as "the body of rules which regulate the relations of the administration or of the administrative authority towards private citizens;" and Aucoc, in his work on *droit administratif*, describes his topic in this very general language: "Administrative law determines (1) the constitution and the relations of those organs of society which are charged with the care of those social interests (*intérêts collectifs*) which are the object of public administration, by which term is meant the different representatives of society among which the State is the most important, and (2) the relation of the administrative authorities towards the citizens of the State."

These definitions are obviously wanting in precision, and their vagueness is not without significance. As far, however, as an Englishman may venture to deduce the meaning of *droit administratif* from foreign treatises and reports, it may (at any rate for our present purpose) be best described as that portion of French law which determines (i.) the position and liabilities of all State officials, and (ii.) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the State, and (iii.) the procedure by which these rights and liabilities are enforced.

The effect of this description is most easily made intelligible to English students by giving examples of the sort of matters to which the rules of administrative law apply. If a minister, a prefect, a policeman, or any other official, commits acts in excess of his legal authority (*excès de pouvoirs*), as, for example, if a police officer, in pursuance of orders, say from the Minister of the Interior, wrongfully arrests a private person, the rights of the individual aggrieved and the mode in which these rights are to be determined is a question of administrative law. If, again, a contractor enters into a contract with any branch of the administration, *e. g.*, for the supply of goods to the government, or for the purchase of stores sold off by a public office, and a dispute arises as to whether the contract has been duly performed, or as to the damages due from the government to the contractor for a breach of it, the rights of the contracting parties are to be determined in accordance with the rules of administrative law, and to be enforced (if at all) by the methods of procedure which that law provides. All dealings, in short, in which the rights of an individual in reference to the State, or officials representing the State, come in question, fall within the scope of administrative law. . . .

The second of the general ideas on which rests the system of administrative law is the necessity of maintaining the so-called separation of powers (*séparation de pouvoirs*), or, in other words, of preventing the government, the legislature, and the courts from encroaching upon one another's province.

The expression "separation of powers," as applied by Frenchmen to the relations of the executive and the courts, with which alone we are here concerned, may easily mislead. It means, in the mouth of a French statesman or lawyer, something different from what we mean in England by the "independence of the judges," or the like expressions. As interpreted by French history, by French legislation, and by the decisions of French tribunals, it means neither more nor less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary courts. It were curious to follow out the historical growth of the whole theory as to the "separation of powers." It rests apparently upon Montesquieu's "*Esprit des Lois*," book xi. c. 6, and is in some sort the offspring of a double misconception; Montesquieu misunderstood on this point the principles and practice of the English Constitution, and his doctrine was in turn, if not misunderstood, exaggerated and misapplied by the French statesmen of the Revolution, whose judgment was biassed, at once by knowledge of the inconveniences which had resulted from the interference of the French "parliaments" in matters of State, and by the characteristic and traditional desire to increase the force of the central government. The investigation, however, into the varying fate of a dogma which has undergone a different development on each side the Atlantic would lead us too far from our immediate topic. All that we need note is the extraordinary influence exerted in France, and in all countries which have followed French examples, by this part of Montesquieu's teaching, and the extent to which it underlies the political and legal institutions of the French Republic. . . .

We can now understand the way in which the existence of a *droit administratif* affects the whole legal position of French public servants, and renders it quite different from that of English officials.

Persons in the employment of the government, who form, be it observed, a much larger and more important part of the community than do the whole body of the servants of the English Crown, occupy in France a position in some respects resembling that of soldiers in England. For the breach of official discipline they are, we may safely assume, readily punishable in one form or another. But if like English soldiers they are subject to official discipline, they have what even soldiers in England do not possess, a very large amount of protection against legal proceedings for wrongs done to private citizens. The party wronged by an official must certainly seek relief, not from

the judges of the land, but from some official court. Before such a body the question which will be mainly considered is likely to be, not whether the complainant has been injured, but whether the defendant, say a policeman, has acted in discharge of his duties and in *bonâ fide* obedience to the commands of his superiors. If the defendant has so acted he will, we may almost certainly assume, be sure of acquittal, even though his conduct may have involved a technical breach of law. . . . We may further draw the general conclusion that under the French system no servant of the government who, without any malicious or corrupt motive, executes the orders of his superiors, can be made civilly responsible for his conduct. He is exempted from the jurisdiction of the civil courts because he is engaged in an administrative act; he is safe from official condemnation because the act complained of is done in pursuance of his official duties.

To this must be added a further consideration, to which for the sake of clearness no reference has hitherto been made. French law appears to recognize an indefinite class of "acts of State," — acts, that is to say, which are done by the government, as matters of police, of high policy, of public security, and the like, and acts of this class do not fall within the control either of the administrative or of any other courts. It would, for example, appear that in questions of extradition, as regards persons who are not French citizens, the government can act freely on its own discretion, and that a foreigner threatened with expulsion or expelled from French territory by orders of the government will not be able to obtain protection or redress in any French court whatever; the executive possesses, under the French constitution, "prerogatives" — no other word so well expresses the idea — which are above and beyond, rather than opposed to, the law of the land.

What may be the precise limits which the system of administrative law taken together with the authority ascribed in France to the executive in matters of State imposes on the jurisdiction of the civil tribunals, no foreigner can pronounce with certainty. These limitations are, however, as we have seen, in many instances very strict, and are certainly sufficient to prevent the judges of the land from pronouncing judgment on wrongs, not amounting to actual crimes, done by officials to private citizens. These restrictions on the authority of the courts must, at any rate as an Englishman would think, diminish the moral influence of the whole judicial body, and deprive the French judicature of that dignity which the English Bench have derived from their undoubted power to intervene, indirectly indeed, but none the less efficiently, in matters of State. The condemnation of general warrants — a condemnation which, whatever be the French law of arrest, could not (it would seem) be at the present day pronounced by any court in France — did as much in the last century to raise the reputation of the Bench as to protect the freedom of the subject. Our judges would with difficulty retain the reverence with which their traditions surround them if the decisions, even of the House of Lords, were, whenever

they were alleged to interfere with the prerogative of the Crown, or the discretionary powers of the ministry, liable to be invalidated by some official body. The separation of powers, as the doctrine is interpreted in France, means, it would seem to an Englishman, the powerlessness of the courts in any conflict with the executive. However this may be, it assuredly means the protection of official persons from the liabilities of ordinary citizens.

Compare for a moment with the position of French officials under the system of *droit administratif* the situation of servants of the Crown in England.

Among modern Englishmen the political doctrines which have in France created the system of *droit administratif* are all but unknown. Our law bears very few traces indeed of the idea that when questions arise between the State or, as we should say, the Crown or its servants and private persons, the interests of the government should be in any sense preferred or the acts of its agents claim any special protection. Our laws, again, lend no countenance to the dogma of the "separation of powers" as that doctrine is understood by Frenchmen. The common law courts have constantly hampered the action of the executive, and by issuing the writ of *habeas corpus* as well as by other means do in fact exert a strict supervision over the proceedings of the Crown and its servants. . . .

The doctrine propounded under various metaphors by Bacon that the prerogative was something beyond and above the ordinary law, is like the foreign doctrine that in matters of high policy the administration has a discretionary authority which cannot be controlled by any court. The celebrated dictum that the judges, though they be "lions," yet should be "lions under the throne, being circumspect that they do not check or oppose any points of sovereignty," is a curious anticipation of the maxim formulated by French revolutionary statesmanship, that the judges are under no circumstances to disturb the action of the administration, and would, if logically worked out, have led to the exemption of every administrative act, or, to use English terms, of every act alleged to be done in virtue of the prerogative from judicial cognizance. The constantly increasing power of the Star Chamber and of the Council gave practical expression to prevalent theories as to the royal prerogative, and it is hardly fanciful to compare these courts, which were in reality portions of the executive government, with the *Conseil d'état* and other *Tribunaux administratifs* of France. Nor is a parallel wanting to the celebrated Article 75 of the Constitution of the Year VIII. This parallel is to be found in Bacon's attempt to prevent the judges, by means of the writ *De non procedendo Rege inconsulto*, from proceeding with any case in which the interests of the Crown were concerned. "The working of this writ," observes Mr. Gardiner, "if Bacon had obtained his object, would have been to some extent analogous to that provision which has been found in so many French constitutions, according to which no

agent of the government can be summoned before a tribunal, for acts done in the exercise of his office, without a preliminary authorization of the Council of State. The effect of the English writ being confined to cases where the king himself was supposed to be injured, would have been of less universal application, but the principle on which it rested would have been equally bad." The principle, moreover, admitted of unlimited extension, and this, we may add, was perceived by Bacon. "The writ," he writes to the king, "is a mean provided by the ancient law of England to bring any case that may concern your Majesty in profit or power from the ordinary Benches, to be tried and judged before the Chancellor of England, by the ordinary and legal part of this power. And your Majesty knoweth your Chancellor is ever a principal counsellor and instrument of monarchy, of immediate dependence on the king; and therefore like to be a safe and tender guardian of the regal rights." Bacon's innovation would, if successful, have formally established the fundamental dogma of administrative law that administrative questions must be determined by administrative bodies.

The analogy between the administrative ideas which still prevail on the Continent<sup>1</sup> and the conception of the prerogative which was maintained by the English Crown in the seventeenth century has considerable speculative interest. That the administrative ideas supposed by many French writers to have been originated by the statesmanship of the great Revolution or of the first Empire are to a great extent developments of the traditions and habits of the French monarchy is almost past a doubt, and it is a curious inquiry how far the efforts made by the Tudors or Stuarts to establish a strong government were influenced by foreign examples. This, however, is a problem for historians. A lawyer may content himself with noting that French history throws light on the causes both of the partial success and of the ultimate failure of the attempt to establish in England a strong administrative system. The endeavor had a partial success, because circumstances, similar to those which made French monarchs ultimately despotic, tended in England during the sixteenth and part of the seventeenth century to increase the influence of the Crown. The attempt ended in failure, partly because of the personal deficiencies of the Stuarts, but chiefly because the whole scheme of administrative law was opposed to those habits of equality before the law which had long been essential characteristics of English institutions. — DICER, *Law of the Const.* c. xii.<sup>2</sup>

It must be recollected that in the Continental States of Europe the courts of law have not, as a rule, the power to decide upon the legality

<sup>1</sup> It is worth noting that the system of "administrative law," though more fully developed in France than elsewhere, exists in one form or another in most of the Continental States.

<sup>2</sup> Reprinted here by permission. — Ed.

or illegality of the administrative acts of executive officials. Such questions seem to be regarded as matters of public right and so properly withheld from the courts, whose jurisdiction over civil rights should not extend beyond private right. It can hardly be denied that every American lawyer, who holds that judicial courts are competent to decide questioned laws to be constitutional or unconstitutional, presupposes that the same courts are competent to decide questioned executive acts to be legal or illegal. Indeed, it is safe to assert, that every American must ponder long before he can understand how a judiciary which cannot question an executive act, can question an act of legislation. When judicial power was in America extended to cases arising under written constitutions, which involved the unconstitutionality and resultant invalidity of legislation, that extension was partially due to originality in creating new institutions and was partially the effect of existing causes. One of the most potent of existing causes must have been that the judges in every land of the common law could decide upon the legality or illegality of the executive acts of officials. It has been said in France that judges should not be competent to decide laws to be unconstitutional because the judiciary is a feeble power. Doubtless, it is correct to say that the judiciary is a feeble power in France and other civil law countries. But in all the lands of the common law, whether in the Eastern, the Western, or the Southern hemisphere, the judiciary is not a feeble power, and never has been. — BRINTON COXE, *Judicial Power and Unconstitutional Legislation*, 102.

In approaching the history of the mediæval church, we may regard the spirituality of England, the clergy or clerical estate, as a body completely organized, with a minutely constituted and regulated hierarchy, possessing the right of legislating for itself and taxing itself, having its recognized assemblies, judicature and executive, and, although not as a legal corporation holding common property, yet composed of a great number of persons, each of whom possesses corporate property by a title which is either conferred by ecclesiastical authority, or is not to be acquired without ecclesiastical assent. . . . The spirituality is by itself an estate of the realm; its leading members, the bishops and certain abbots, are likewise members of the estate of baronage; the inferior clergy, if they possess lay property or temporal endowments, are likewise members of the estate of the commons. . . . As an estate of the realm the spirituality recognizes the headship of the king, as a member of the Church Catholic it recognizes, according to the mediæval idea, the headship of the pope. . . . They recognize the king as supreme in matters temporal, and the pope as supreme in matters spiritual; but there are questions as to the exact limits between the spiritual and the temporal, and most important questions touching the precise relations between the Crown and the Papacy. On mediæval theory the king is a spiritual son of the pope; and the pope



may be the king's superior in things spiritual only, or in things temporal and spiritual alike. . . .

The idea of placing in one and the same hand the direct control of all causes temporal and spiritual was not unknown in the Middle Ages. The pope's spiritual supremacy being granted, complete harmony might be attained not only by making the pope supreme in matters temporal, but by delegating to the king supremacy in matters spiritual. . . . There were not wanting men who would try to persuade him [Henry II.] that even without any such commission he was supreme in spiritual as well as in temporal matters. Reginald Fitz Urse, when he was disputing with Becket just before the murder, asked him from whom he had the archbishopric? Thomas replied, "The spirituals I have from God and my lord the pope, the temporals and possessions from my lord the king." "Do you not," asked Reginald, "acknowledge that you hold the whole from the king?" "No," was the prelate's answer; "we have to render to the king the things that are the king's, and to God the things that are God's." The words of the archbishop embody the commonly received idea; the words of Reginald, although they do not represent the theory of Henry II., contain the germ of the doctrine which was formulated under Henry VIII. — 3 STUBBS, *Const. Hist. Eng.* ch. xix. §§ 376, 377.

A case of 1505-6 (Y. B. 21 H. VII., 1, 1), is stated by Coxe (*Judic. Power and Unconst. Leg.* 147), in which the validity of an Act of Parliament was debated. In this case KINGSMILL, J. (fol. 2 *a*), said: "But, sir, the Act of Parliament cannot make the king a parson, for we, by our law, cannot make any temporal man have spiritual jurisdiction; no one can do this except the Supreme Head" [*i. e.*, the pope]. Later on *Palmer*, "one of the new sergeants" (fol. 2 *b*), argued: "No temporal Act can make a temporal man have spiritual jurisdiction; if it were ordained by Act that so and so should not offer any tithes to his curate, the Act would be void. And at the end of the case FROWIKE, C. J. (fol. 4 *b*), said: "As to the other matter, whether the king can be parson by the Act of Parliament, — as I understand, it is no great matter for argument; I have never seen that any temporal man can be a parson without the assent of the Supreme Head. . . . And so a temporal Act, without the assent of the Supreme Head, cannot make the king a parson."

Coxe, *ubi supra*, p. 148, remarks: "It may seem strange to many of Blackstone's readers that parliamentary power should be spoken of as limited; but it would have seemed stranger to Englishmen before the Reformation for any one to say that the temporal Parliament could legislate with unlimited power in ecclesiastical matters regardless of the pope's wishes and authority. It required the Reformation, that is to say, an ecclesiastical revolution, for Parliament to obtain its modern plenitude of power in matters ecclesiastical."

This "ecclesiastical revolution" came within thirty years after the

debate above referred to, — within the lifetime of those who heard it. In 1534 the Convocations of Canterbury and York announced that “the Bishop of Rome has no greater jurisdiction conferred on him by God in this kingdom of England than any other foreign bishop” (Acland and Ransome, *Polit. Hist. of England*, 75); and in the next year the “Supreme Head” of the Church of England was declared by Act of Parliament to be the King of England (Stat. 26 H. VIII. c. i.).

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IN THE MATTER OF CAVENDISH.

COMMON BENCH. 1587.

[1 *Anderson*, 152.]<sup>1</sup>

ONE R. Cavendish suggested to the queen that she had power to establish the office of making all the writs of *supersedeas quia inprovidie emanavit* in the Common Bench: whereupon the queen, by her letters-patent, granted to the said Cavendish the office of making the said writs for some years, with words of *constituimus*; after making which patent, the judges were commanded orally, by a messenger, to admit the said Cavendish to the said office. The judges did not do it; and thereupon Cavendish procured the directing of a letter to the said judges, under the sign-manual and signet, in these words: —

“Trusty and well-beloved, we greet you well; whereas we perceive that notwithstanding our grant unto our well-beloved servant, Richard Cavendish, of the writs of *supersedeas* upon exigent in that court, he is as yet impeached from the exercise thereof, a matter that we cannot but think strange, being contrary to our meaning, and to the expectation we had of more conformity to be found to the yielding to our said grant than yet we perceive; so as thereby our said servant remaineth as yet frustrate of the commodity and benefit due to the said office; We let you weet that our express will and commandment is, that forthwith you give order that a sequestration of all the profits already grown since our grant to our said servant, and continuing to grow of the said office, be made and committed unto such persons as you shall think meet, with whom you shall take order by bond or other sufficient manner to answer, and yield the same profits unto our said servant, or to any other to whom the same shall be due immediately after the controversy for the execution of the said office shall be decided or ordered, whereof we eftsoones will you not to fail, &c.”

The justices considered this letter, and thought that they could not lawfully act according to the contents of the said letter and its order, because it might be that by such sequestration others, alleging the right to make these writs, might be disseised of their freehold, claimed by

<sup>1</sup> Translated from the Reporter's French. — ED.

them, in the making of these writs and fees thereupon. All this was told the queen by great men, friends of Cavendish. Thereupon another letter, under the signet and sign-manual, was directed to the justices, as follows : —

“Trusty and well-beloved, . . . we greet you well, whereas we granted to our trusty and well-beloved servant, Richard Cavendish, Esquire, by our letters-patent, under our great seal of England, the making and writing of all *supersedeases* upon exigent issuing out of our Court of Common Pleas, and have divers times sent unto you for his admittance into the said office, as well by message delivered by persons near about us as otherwise, which nevertheless hath been neglected, in consideration whereof we, for that our said servant was to depart into the Low Countries for a season, gave commandment for the sequestration *de les profits* of the said office until our further pleasure therein should be declared; wherefore for that we look for some more dutiful regard to be had by you of our prerogative royal, we have thought good to signify our further pleasure unto you in this behalf, which is that our said servant be no longer withholden from the benefit and use of our said grant; and these are therefore to will and command you and every of you, that immediately upon the sight thereof, without any further delay, you cause present payment to be made unto them [him] or to his assignee of all the foresaid profits since the day of our said grant upon bond with condition that if from time of his admission into the said office, he, his deputy or deputies, shall by virtue of our said grant hold and enjoy the same without lawful eviction or recovery thereof out of the hands of him or his deputy or deputies by any other pretending title to the making and writing of the said writs, that then the said obligation to be void, &c. And furthermore our will and pleasure is, and thereunto we will and command you that upon our said servant offering of himself unto you in our said court this next term, you presently without any further delay admit him unto the use, execution, and profits of the said office according to our said grant; for that we be nothing ignorant that if any of your clerks have any such title or interest as they pretend, both our laws lie open for their remedy, and also they be persons both for wealth and skill able to recover their own right if any such be. In consideration whereof we look that you and every of you should dutifully fulfil our commandment therein, and these our letters shall be your warrant, &c.”

This letter was delivered to the justices in presence of the Lord Chancellor of England and the Earl of Leicester at the beginning of the Easter Term, in the twenty-ninth year of the queen [1587]; and the Lord Chancellor declared to the judges that the queen had made the said patent to Cavendish upon a great desire that she had to provide advancement for him; that she understood that by this means he might enjoy this [right], and that she cared much about it. On which account she had commanded him and the said viscount [*sic*] to hear

the answer of the justices to the contents of the letter last mentioned. Thereupon the justices took the letter, and desired a little time to inspect and consider it; which was thought convenient. After perusing the letter, they went at once to the said lords and said for their answer that in all lawful points they would dutifully and in humble manner obey her Majesty, but as regards this case they could not without being perjured; and this, as they said, they well knew that the queen would not knowingly command or require.

Upon this they departed; and the said answer was reported to the queen, who commanded the said Chancellor, the Chief Justice of the King's Bench, and the Master of the Rolls to hear from the said judges the reasons and grounds which moved them to make such an answer; and also what they had to say against the prerogative and right of the queen in this matter; and therewith the learned counsel of the queen were commanded to attend. All these being assembled, the queen's sergeant showed that the queen had the right and prerogative of granting the making of these writs. . . . To which, for the judges, it was protested that with all their power they would aid her Majesty in all her rights, being bound thereto not only by common duty, but by oath, which rights they wished might be maintained and preserved; but for their answer it was said that this mode of proceeding was out of the course of justice, and therefore they would not make answer to those who had spoken. Their reasons they gave as follows, *viz.*: that they had and claimed nothing as to the making of the said writs, but the prenotaries and divers exponents of the same place, — who claimed it as a freehold for their lives. These, in law and reason, should be brought to answer, and not the judges; for these, and no others, were they who were to be touched as regards profit or damage by this; and always they who have the thing in controversy are the persons to answer as to what is in question. On this point no other answer was made.

When this was ended, the letters above recited were shown, and the judges were charged with not having obeyed the orders therein contained. To this they said that they must needs confess that they had not performed the orders; but this was no offence or contempt to her Majesty, for the orders were against the law of the land (*le ley de terre*), in which case it was said, no one is bound to obey such an order: and they offered to show what had been adjudged heretofore to prove what they said to be true.

And they said that the queen herself was sworn and took oath to keep her laws, and the judges also, as regards their willingly breaking them. As to this matter, so far as it concerned the judges, they answered again that if they obeyed these orders they should act otherwise than the laws warranted, and merely and directly against them; and that was contrary to their oath, and in contempt of God, her Majesty, and the country and commonwealth in which they were born and lived; of which, if the fear of God were gone from them, yet the examples of others and the punishment of those who had formerly violated the laws,

reminded them, and recalled them from such offences. The examples and precedents in these matters were remembered; namely: [Then followed brief statements as to Hugh Despenser, Lord Chamberlain of Edward II., Thorp, J., in the time of Edward III., "certain precedents of the time of Richard II.," and last the indictments against Empson, lately councillor to King Henry VII.; one of which only is recited at large, *pur avoyder tediousness*. Then Magna Carta, c. 29 (9 H. III.) was cited, and statutes 5 Ed. III. c. 9, and 28 Ed. III. c. 3; and another of 11 Rich., providing "that neither letters of signet, nor of the king's secret seal, shall be from henceforth sent in damage or prejudice of the realm."]

By which laws the office and duty of judges appears and of all others whomsoever; and also by the precedents before cited it appears what an offence it is willingly to break the laws of the land. . . . For these reasons, and because the queen and the judges are sworn, they said that they would not act according to the said letters. The oath of the queen and the judges appears in print, and so it need not be written here.

All this was reported by the said Lord Chancellor to the queen with his good allowance of the matters aforesaid and reasons alleged; which her Majesty, as I have heard,<sup>1</sup> well accepted. But nothing more was done or heard by the judges in the said Easter Term, or in the Trinity Term then next following; which moves the judges to think that no more will ever be.

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### DARCY v. ALLEN. (THE CASE OF MONOPOLIES.)

KING'S BENCH. 1603.

[*Moore*, 671; s. c. 11 Co. 84 b.]<sup>2</sup>

IN the King's Bench; an action on the case; and a count that, whereas men of mean trades and occupations in the commonwealth apply themselves to idle games with cards, the queen, by way of redress and restraint of this enormity, made letters-patent to Ralph Bowes, authorizing him and his factors and deputies to provide playing-cards, and prohibiting all others to import playing-cards into the realm or to make or sell them in the realm for a certain term of years now expired, and (reciting the grant) she made another like grant to Darcy, who provided cards accordingly: yet the defendant brought cards into the realm and sold them and did things contrary to the privilege granted to the plaintiff, and to his damage to the amount of £2,000. The defend-

<sup>1</sup> It is Anderson, the Chief Justice of the court, who is reporting the case. — Ed.

<sup>2</sup> The statement of the case and a part of the argument are translated from the French of Moore. The opinion is not given by him, and so far as here presented, is taken from Coke. — Ed.

ant pleaded the custom of London, that a freeman may buy and sell all things merchantable, and that, since he was a freeman and haberdasher of London, and cards were things merchantable, he bought and sold them; and he demanded judgment. The plaintiff demurred in law; and it was argued first, Trin. 44 Eliz. [1602], by *Altham*, with the plaintiff, and *Dyer*, with the defendant. . . . Afterwards, Mich. 44 and 45 Eliz. [1602], it was argued by *Dodderidge*, against the patent, and by *Fleming*, solicitor, with the patent; and afterwards, the same term, by *Fuller*, against the patent, and *Coke*, Attorney-General, with the patent. And *Dodderidge* said that the case was tender, concerning the prince's prerogative and the subject's liberty, and must be argued with much caution; for *he that heus above his hand chips will fall into his eyes, and qui majestatem scrutatur principis opprimetur splendore ejus*. Yet since it is the honor and safety of the prince to govern by the laws, . . . as Bracton says, *merito retribuatur Rex legi quod lex attribuat ei*,<sup>1</sup> therefore the princes of this realm have always been content that their patents and grants should be examined by the laws, and so is her Majesty that now is. In this examination it has always been held by the judges that the queen's grants procured against the usual and settled liberty of the subjects are void, and also those which tend to their grievance and oppression. . . .

It was . . . resolved by *POPHAM*, Chief Justice, *et per totam curiam*, that the said grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons: 1. That it is a monopoly, and against the common law. 2. That it is against divers Acts of Parliament. . . .

3. The queen was deceived in her grant; for the queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; moreover the queen meant that the abuse should be taken away, which shall never be by this patent, but *potius* the abuse will be increased for the private benefit of the patentee, and therefore, as it is said in 21 E. 3, 47, in the Earl of Kent's case, this grant is void *jure Regio*. 4. This grant is *primæ impressionis*, for no such was ever seen to pass by letters-patent under the great seal before these days, and therefore it is a dangerous innovation, as well without any precedent, or example, as without authority of law or reason. . . . And therefore it was resolved, that the queen could not suppress the making of cards within the realm, no more than the making of dice, bowls, balls, hawks' hoods, bells, lures, dog-couples, and other the like, which are works of labor and art, although they serve for pleasure, recreation, and pastime, and cannot be suppressed but by Parliament, nor a man restrained from exercising any trade, but by Parliament, 37 E. 3, cap. 16, 5 Eliz. cap. 4. . . .

<sup>1</sup> *Attribuat igitur rex legi, quod lex attribuit ei, videlicet, dominationem et potestatem.* BRACTON, 5 b. — ED.

Also such charter of a monopoly, against the freedom of trade and traffic, is against divers Acts of Parliament, *sc.* 9 E. 3, c. 1 & 2, which for the advancement of the freedom of trade and traffic extends to all things vendible, notwithstanding any charter of franchise granted to the contrary, or usage, or custom, or judgment given upon such charter, which charters are adjudged by the same Parliament to be of no force or effect, and made to the derogation of the prelates, earls, barons, and grandees of the realm, and to the oppression of the Commons. And by the statute of 25 E. 3, cap. 2, it is enacted that the said Act of 9 E. 3, shall be observed, holden, and maintained in all points. And it is further by the same Act provided, that if any statute, charter, letters-patent, proclamation, command, usage, allowance, or judgment be made to the contrary, that it shall be utterly void. *Vide Magna Charta*, cap. 18, 27 E. 3 cap. 11, &c. . . .

And *nota*, reader, and well observe the glorious preamble and pretence of this odious monopoly. And it is true *quod privilegia quæ re vera sunt in præjudicium reipublicæ, magis tamen speciosa habent frontispicia, et boni publici prætextum, quam bonæ et legales concessionibus, sed prætextu liciti non debet admitti illicitum.* And our lord the king that now is, in a book which he in zeal to the law and justice commanded to be printed *anno* 1610,<sup>1</sup> entitled, “A Declaration of His Majesty’s Pleasure, &c.,” p. 13, has published, that monopolies are things against the laws of this realm, and therefore expressly commands that no suitor presume to move him to grant any of them, &c.

In the famous *Case of Ship-Money*, 3 How. St. Tr. 825, in 1637, the prerogative of the Crown was much discussed. Hallam (Const. Hist. c. vii.), gives a convenient abstract of it.

“The first writ issued from the council in October, 1634. It was directed to the magistrates of London and other sea-port towns. Reciting the depredations lately committed by pirates, and slightly adverting to the dangers imminent in a season of general war on the Continent, it enjoins them to provide a certain number of ships of war of a prescribed tonnage and equipage, empowering them also to assess all the inhabitants for a contribution toward this armament according to their substance. . . .

“This desire of being at least prepared for war, as well as the general system of stretching the prerogative beyond all limits, suggested an extension of the former writs from the sea-ports to the whole kingdom. Finch, Chief Justice of the Common Pleas, has the honor of this improvement on Noy’s scheme. He was a man of little learning or respectability, a servile tool of the despotic cabal, who, as speaker of the last Parliament, had, in obedience to a command from the king to adjourn, refused to put the question upon a remonstrance moved in the House. By the new writs for ship-money, properly so denominated,

<sup>1</sup> This volume of Coke’s Reports was published in 1615. — Ed.

since the former had only demanded the actual equipment of vessels, for which inland counties were of course obliged to compound, the sheriffs were directed to assess every land-holder and other inhabitant according to their judgment of his means, and to enforce the payment by distress. . . .

"The first that resisted was the gallant Richard Chambers, who brought an action against the lord mayor for imprisoning him on account of his refusal to pay his assessment on the former writ. The magistrate pleaded the writ as a special justification; when Berkley, one of the judges of the King's Bench, declared that there was a rule of law and a rule of government; that many things which could not be done by the first rule, might be done by the other, and would not suffer counsel to argue against the lawfulness of ship-money. The next were Lord Say and Mr. Hampden, both of whom appealed to the justice of their country; but the famous decision which has made the latter so illustrious, put an end to all attempts at obtaining redress by course of law.

"Hampden, it seems hardly necessary to mention, was a gentleman of good estate in Buckinghamshire, whose assessment to the contribution for ship-money demanded from his county amounted only to twenty shillings. The cause, though properly belonging to the Court of Exchequer, was heard, on account of its magnitude, before all the judges in the Exchequer Chamber. The precise question, so far as related to Mr. Hampden, was, Whether the king had a right, on his own allegation of public danger, to require an inland county to furnish ships, or a prescribed sum of money by way of commutation, for the defence of the kingdom? It was argued by St. John and Holborne in behalf of Hampden, and by the Solicitor-General Littleton and the Attorney-General Banks for the Crown. . . .

"Some of the judges who pronounced sentence in this cause . . . denied the power of Parliament to limit the high prerogatives of the Crown. . . . 'Where Mr. Holborne,' says Justice Berkley, 'supposed a fundamental policy in the creation of the frame of this kingdom, that in case the monarch of England should be inclined to exact from his subjects at his pleasure, he should be restrained, for that he could have nothing from them but upon a common consent in Parliament; he is utterly mistaken herein. The law knows no such king-yoking policy. The law is itself an old and trusty servant of the king's; it is his instrument or means which he useth to govern his people by: I never read nor heard that *lex* was *rex*; but it is common and most true that *rex* is *lex*.' Vernon, another judge, gave his opinion in few words: 'That the king, *pro bono publico*, may charge his subjects for the safety and defence of the kingdom, notwithstanding any Act of Parliament, and that a statute derogatory from the prerogative doth not bind the king; and the king may dispense with any law in cases of necessity.' Finch, the adviser of the ship-money, was not backward to employ the same argument in its behalf. 'No Act of Parliament,' he told them, 'could bar a king of his regality, as that no land should hold of him, or bar him



of the allegiance of his subjects or the relative on his part, as trust and power to defend his people; therefore Acts of Parliament to take away his royal power in the defence of his kingdom are void; they are void Acts of Parliament to bind the king not to command the subjects, their persons and goods, and I say, their money too, for no Acts of Parliament make any difference.’<sup>1</sup>

“Seven of the twelve judges, namely, Finch, Chief Justice of the Common Pleas, Jones, Berkley, Vernon, Crawley, Trevor, and Weston, gave judgment for the Crown. Brampston, Chief Justice of the King’s Bench, and Davenport, Chief Baron of the Exchequer, pronounced for Hampden, but on technical reasons, and adhering to the majority on the principal question. Denham, another judge of the same court, being extremely ill, gave a short written judgment in favor of Hampden; but Justices Croke and Hutton, men of considerable reputation and experience, displayed a most praiseworthy intrepidity in denying, without the smallest qualification, the alleged prerogative of the Crown and the lawfulness of the writ for ship-money.”<sup>2</sup>

<sup>1</sup> “The soil of the sea,” said Finch in his opinion, “belongs to the king, who is lord and sole proprietor thereof. . . . The king holds this diadem of God only; all others hold their lands of him, and he of none but God.” — Ed.

<sup>2</sup> All these proceedings about ship-money, judicial and other, were declared illegal by Act of Parliament (Stat. 16 Car. I. c. 14), in May, 1641. The Act ran as follows:

“Whereas divers writs of late time issued under the great seal of England, commonly called *ship-writs*, for the charging of the ports, towns, cities, boroughs, and counties of this realm respectively, to provide and furnish certain ships for his Majesty’s service: (2) And whereas upon the execution of the same writs and returns of *certioraries* thereupon made, and the sending the same by *mittimus* into the Court of Exchequer, process hath been thence made against sundry persons pretended to be charged by way of contribution, for the making up of certain sums assessed for the providing of the said ships, and in especial in Easter Term in the thirteenth year of the reign of our sovereign lord the king that now is, a writ of *scire facias* was awarded out of the Court of Exchequer, to the then sheriff of Buckinghamshire, against John Hampden, Esquire, to appear and show cause, why he should not be charged with a certain sum so assessed upon him; (3) upon whose appearance and demurrer to the proceedings therein, the barons of the Exchequer adjourned the same case into the Exchequer Chamber, where it was solemnly argued divers days, and at length it was there agreed by the greater part of all the justices of the Courts of King’s Bench and Common Pleas, and of the barons of the Exchequer, there assembled, That the said John Hampden should be charged with the said sum so as aforesaid assessed on him; (4) the main grounds and reasons of the said justices and barons which so agree, being, that when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, the king might by writ under the great seal of England, command all the subjects of this his kingdom, at their charge, to provide and furnish such number of ships with men, victuals, and munition, and for such time as the king should think fit, for the defence and safeguard of the kingdom from such danger and peril, and that by law the king might compel the doing thereof, in case of refusal or refractoriness; (5) and that the king is the sole judge, both of the danger and when and how the same is to be prevented and avoided; (6) according to which grounds and reasons, all the justices of the said Courts of King’s Bench and Common Pleas, and the said barons of the Exchequer, having been formerly consulted with by his Majesty’s command, had set their hands to an extrajudicial opinion, expressed to the same purpose; which opinion, with their names thereunto, was also by his Majesty’s command enrolled in the Courts of Chancery, King’s Bench, Common Pleas and Exchequer, and likewise entered

THE Government of the Commonwealth of England, Scotland, and Ireland, and the Dominions thereto belonging, as it was publicly declared at Westminster, the 16th day of December, 1653, . . . at which time and place his Highness, Oliver Lord Protector of the said Commonwealth, took a solemn oath for observing the same. Published by his Highness the Lord Protector's Special Commandment. Printed in the year 1653.<sup>1</sup>

I. That the supreme legislative authority of the Commonwealth of England, Scotland, and Ireland, and the dominions thereto belonging, shall be and reside in one person, and the people assembled in Parliament; the style of which person shall be Lord Protector of the Commonwealth of England, Scotland, and Ireland.

among the remembrances of the Court of Star Chamber, and according to the said agreement of the said justices and barons, judgment was given by the barons of Exchequer, That the said John Hampden should be charged with the said sum so assessed on him; (7) and whereas some other actions and process depend, and have depended, in the said Court of Exchequer, and in some other courts against other persons, for the like kind of charge, grounded upon the said writs, commonly called *ship-writs*, all which writs and proceedings as aforesaid, were utterly against the law of the land;

"II. Be it therefore declared and enacted by the king's most excellent Majesty, and the lords and commons, in this present Parliament assembled, and by the authority of the same, That the said charge imposed upon the subject, for the providing and furnishing of ships, commonly called ship-money, and the said extrajudicial opinion of the said justices and barons, and the said writs, and every of them, and the said agreement or opinion of the greater part of the said justices and barons, and the said judgment given against the said John Hampden, were and are contrary to and against the laws and statutes of this realm, the right of property, the liberty of the subjects, former resolutions in Parliament, and the petition of right made in the third year of the reign of his Majesty that now is.

"III. And it is further declared and enacted by the authority aforesaid, That all and every the particulars prayed or desired in the said petition of right, shall from henceforth be put in execution accordingly, and shall be firmly and strictly holden and observed, as in the same petition they are prayed and expressed; (2) and that all and every the records and remembrances of all and every the judgment, enrolments, entry, and proceedings as aforesaid, and all and every the proceedings whatsoever, upon or by pretext or color of any of the said writs, commonly called *ship-writs*, and all and every the dependants on any of them, shall be deemed and adjudged to all intents, constructions, and purposes, to be utterly void and disannulled; and that all and every the said judgment, enrolments, entries, proceedings, and dependants of what kind soever, shall be vacated and cancelled in such manner and form as records use to be that are vacated."

On Jan. 30, 1648-49, came the execution of the king, and on the 17th of the next March the abolition of the office of king (2 Scobell, 7); on the 19th of the same March, the abolition of the House of Lords by "the Commons of England, assembled in Parliament" (2 Scobell, 8); and on the 19th of the next May (2 Scobell, 35) it was "declared and enacted by this present Parliament . . . that the people of England . . . are and shall be . . . a Commonwealth and Free State, and shall from henceforth be governed as [such] . . . by the Supreme Authority of this Nation, the Representatives of the people in Parliament, and by such as they shall appoint and constitute as officers and ministers under them." . . . — Ed.

<sup>1</sup> This document, known as "The Instrument of Government," "was drawn up by Cromwell's leading supporters and accepted by himself." — GARDINER'S *Student's Hist. Eng.* 568. See 6 Somers's Tracts (2d ed.), 284, Gardiner's Const. Doc. Purit. Rev. lvi. 314. — Ed.

II. That the exercise of the chief magistracy and administration of the government over the said countries and dominions, and the people thereof, shall be in the Lord Protector, assisted with a council; the number whereof shall not exceed twenty-one, nor be less than thirteen.

III. That all writs, processes, commissions, patents, grants, and other things, which now run in the name and style of the keepers of the liberty of England by authority of Parliament, shall run in the name and style of the Lord Protector, from whom, for the future, shall be derived all magistracy and honors in these three nations; and shall have the power of pardons (except in case of murder and treason), and benefit of all forfeitures for the public use: And shall govern the said countries and dominions in all things by the advice of the council, and according to these presents and the laws.

IV. That the Lord Protector, the Parliament sitting, shall dispose and order the militia and forces both by sea and land, for the peace and good of the three nations, by consent of Parliament; and that the Lord Protector, with the advice and consent of the major part of the council, shall dispose and order the militia for the ends aforesaid, in the intervals of Parliament.

V. That the Lord Protector, by the advice aforesaid, shall direct, in all things, concerning the keeping and holding of a good correspondence with foreign kings, princes, and States; and also, with the consent of the major part of the council, have the power of war and peace.

VI. That the laws shall not be altered, suspended, abrogated, or repealed, nor any new law made, nor any tax, charge, or imposition laid upon the people, but by common consent in Parliament, save only as is expressed in the 30th article.

VII. That there shall be a Parliament summoned to meet at Westminster upon the third day of September, one thousand six hundred fifty-four; and that successively a Parliament shall be summoned once in every third year, to be accounted from the dissolution of the preceding Parliament.

VIII. That neither the Parliament to be next summoned, nor any successive Parliaments, shall, during the time of five months, to be accounted from the day of their first meeting, be adjourned, prorogued, or dissolved, without their own consent. . . .

XVII. That the persons who shall be elected to serve in Parliament, shall be such (and no other than such) as are persons of known integrity, fearing God, and of good conversation, and being of the age of one and twenty years.

XVIII. That all and every person and persons, seized or possessed to his use, of any estate, real or personal, to the value of two hundred pounds, and not within the aforesaid exceptions, shall be capable to elect members to serve in Parliament for counties. . . .

XXII. That the persons chosen and assembled in manner aforesaid, or any sixty of them, shall be, and be deemed the Parliament of England, Scotland, and Ireland, and the supreme legislative power to be

and reside in the Lord Protector and such Parliament, in manner herein expressed.

XXIII. That the Lord Protector, with the advice of the major part of the council, shall at any other time than is before expressed, when the necessities of the State shall require it, summon Parliaments in manner before expressed, which shall not be adjourned, prorogued, or dissolved, without their own consent, during the first three months of their sitting: And in case of future war with any foreign State, a Parliament shall be forthwith summoned for their advice concerning the same.

XXIV. That all bills agreed unto by the Parliament shall be presented to the Lord Protector for his consent; and in case he shall not give his consent thereto within twenty days after they shall be presented to him, or give satisfaction to the Parliament, within the time limited, that then, upon declaration of the Parliament, that the Lord Protector hath not consented, nor given satisfaction, such bills shall pass into, and become laws, although he shall not give his consent thereunto; provided such bills contain nothing in them contrary to the matters contained in these presents. . . .

XXX. That the raising of money for defraying the charge of present extraordinary forces, both at land and sea, in respect of the present wars, shall be by consent in Parliament, and not otherwise, save only that the Lord Protector, with the consent of the major part of the council, for preventing the disorders and dangers which may otherwise fall out both at sea and land, shall have power, until the meeting of the first Parliament, to raise money for the purposes aforesaid, and also to make laws and ordinances for the peace and welfare of these nations, where it shall be necessary, which shall be binding and in force, until order shall be taken in Parliament concerning the same. . . .

XXXII. That the office of the Lord Protector, over these nations, shall be elective, and not hereditary; and upon the death of the Lord Protector, another fit person shall be forthwith elected to succeed him in the government, which election shall be by the council; who, immediately upon the death of the Lord Protector, shall assemble in the chamber where they usually sit in council; and having given notice to all their number of the cause of their assembling, shall, being thirteen at least present, proceed to the election, and before they depart out of the said chamber, shall elect a fit person to succeed in the government, and forthwith cause proclamation thereof to be made in all the three nations as shall be requisite: And the person that they or the major part of them shall elect, as aforesaid, shall be, and shall be taken to be Lord Protector over these nations of England, Scotland, and Ireland, and the dominions thereto belonging; provided that none of the children of the king, nor any of his line, or family, be elected to be Lord Protector, or other chief magistrate over these nations, or any of the dominions thereto belonging: And until the aforesaid election be past, the council shall take care of the government, and administer in all

things as fully as the Lord Protector, or the Lord Protector and council are enabled to do.

XXXIII. That Oliver Cromwell, Captain-General of the forces of England, Scotland, and Ireland, shall be, and is hereby declared to be Lord Protector of the Commonwealth of England, Scotland, and Ireland, and the dominions thereto belonging for his life.

XXXIV. That the Chancellor, Keeper, or Commissioners of the Great Seal, the Treasurer, Admiral, Chief Governors of Ireland and Scotland, and the Chief Justices of both the benches, shall be chosen by the approbation of Parliament, and in the intervals of Parliament, by the approbation of the major part of the council, to be afterward approved by the Parliament. . . .

XXXVII. That such as profess faith in God by Jesus Christ (though differing in judgment from the doctrine, worship, or discipline, publicly held forth) shall not be restrained from, but shall be protected in the profession of the faith, and exercise of their religion, so as they abuse not this liberty, to the civil injury of others, and to the actual disturbance of the public peace on their parts; provided this liberty be not extended to Popery or prelacy, nor to such as, under the profession of Christ, hold forth and practise licentiousness.

XXXVIII. That all laws, statutes, ordinances, and clauses in any law, statute, and ordinance to the contrary of the aforesaid liberty, shall be esteemed as null and void. . . .

XLI. That every successive Lord Protector over these nations shall take and subscribe a solemn oath, in the presence of the council, and such others as they shall call to them, That he will seek the peace, quiet, and welfare of these nations, cause law and justice to be equally administered, and that he will not violate or infringe the matters and things contained in this writing; and in all other things will, to his power, and to the best of his understanding, govern these nations, according to the laws, statutes, and customs.

XLII. That each person of the council shall, before they enter upon their trust, take and subscribe an oath, That they will be true and faithful in their trust, according to the best of their knowledge; and that, in the election of every successive Lord Protector, they shall proceed therein impartially, and do nothing therein for any promise, fear, favor, or reward.<sup>1</sup>

WHERE there is, then, a righteous and good constitution of government, there is first an orderly union of many understandings together, as the public and common supreme judicature or visible sovereignty, set

<sup>1</sup> See the Constitutional Bill of the First Parliament of the Protectorate (1654), Gardiner's *Doc. Purit. Rev.* lx. 353. The adoption of this was prevented by a dissolution. The Second Parliament, in 1657, presented amendments to the existing instrument under the name of "The Humble Petition and Advice" (2 Scobell, 378), including the establishment of a second chamber. Most of these were accepted by the Protector. Meantime interesting speculations were put forward by Vane and Harrington. — Ed.

in a way of free and orderly exercise for the directing and applying the use of the ruling power or the sword to promote the interest and common welfare of the whole. . . .

A supreme judicature thus made the representative of the whole is that which we say will most naturally care and most equally provide for the common good and safety. . . . And if this which is so essential to the well-being and right constitution of government were once obtained, . . . what could be propounded afterwards, as to the form of administration, that would much stick? Would a standing council of State settled for life in reference to the safety of the commonwealth, and for the maintaining intercourse and commerce with foreign States, under the inspection and oversight of the supreme judicature, but of the same fundamental constitution with themselves, — would this be disliked? Admitting their orders were binding in the intervals of supreme national assemblies, so far only as consonant to the settled laws of the commonwealth; the vacancy of any of which, by death or otherwise, might be supplied by the vote of the major part of themselves. Nay, would there be any just exception to be taken, if, besides both these, it should be agreed, as another part of the fundamental constitution of the government, to place that branch of sovereignty which chiefly respects the execution of laws in a distinct office from that of the legislative power, and yet subordinate to them and to the laws, capable to be intrusted into the hands of one single person, if need require, or in a greater number, as the legislative power should think fit; and for the greater strength and honor unto this office, that the execution of all laws and orders, that are binding may go forth in his or their name; and all disobedience thereunto, or contempt thereof, be taken as done to the people's sovereignty, whereof he or they bear the image or representation, subordinate to the legislative power, and at their will to be kept up and continued in the hands of a single person or more, as the experience of the future good or evil of it shall require. . . .

And unto this the wisdom and honesty of the persons now in power may have an opportunity eminently to come into discovery; for in this case, and upon the grounds already laid, the very persons now in power are they unto whose lot it would fall to set about this preparatory work, and by their orders and directions to dispose the whole body and bring them into the meetest capacity to effect the same. The most natural way for which would seem to be by a general council, or convention of faithful, honest, and discerning men, chosen for that purpose, by the free consent of the whole body of adherents to this cause, in the several parts of the nations, and observing the time and place of meeting appointed to them, with other circumstances concerning their election, by order from the present ruling power, but considered as general of the army. Which convention is not properly to exercise the legislative power, but only to debate freely, and agree upon the particulars, that, by way of fundamental constitutions, shall be laid and inviolably observed, as the conditions upon which the whole body so represented

doth consent to cast itself into a civil and politic incorporation, and under the visible form and administration of government therein declared, and to be by each individual member of the body subscribed in testimony of his or their particular consent given thereunto. Which conditions so agreed, and amongst them an act of oblivion for one will be without danger of being broken or departed from, considering of what it is they are the conditions, and the nature of the convention wherein they are made, — which is of the people represented in their highest state of sovereignty, as they have the sword in their hands unsubjected unto the rules of civil government, but what themselves, orderly assembled for that purpose, do think fit to make. And, the sword, upon these conditions, subjecting itself to the supreme judicature thus to be set up, how suddenly might harmony, righteousness, love, peace, and safety unto the whole body follow hereupon, as the happy fruit of such a settlement, if the Lord have any delight to be amongst us. — SIR HENRY VANE, *A Healing Question Propounded and Resolved*, published in 1656, 6 Somers's Tracts (2d ed.), 304.<sup>1</sup>

THE power or function of the prerogative<sup>2</sup> is of two parts, the one of result [*i. e.*, of deciding, or coming to a result, upon the propositions of the Senate], in which it is the legislative power; the other, that of judicature, in which regard it is the highest court, and the last appeal in this commonwealth. . . . But the prerogative tribe has not only the result, but is the supreme judicature, and the ultimate appeal in this commonwealth. For the popular government that makes account to be of any standing, must make sure in the first place of the appeal to the people. As an estate in trust becomes a man's own if he be not answerable for it, so the power of a magistracy not accountable to the people from whom it was received, becoming of private use, the commonwealth loses her liberty. Wherefore the right of supreme judicature in the people (without which there can be no such thing as popular government) is confirmed by the constant practice of all commonwealths. — HARRINGTON, *Oceana* (published in 1656); *Works* (3d ed.) 155, 158.<sup>3</sup>

Where the people are not overbalanced by one man, or by the few, they are not capable of any other superstructures of government, or of any other just and quiet settlement whatsoever, than of such only as consists of a senate as their councillors, of themselves or their representatives as sovereign lords, and of a magistracy answerable to the people, as distributors and executioners of the laws made by the people. And thus much is of absolute necessity to any or every government, that is or can be properly called a commonwealth, whether it be well or ill ordered.

<sup>1</sup> See Professor Hosmer's *Life of Vane*. — Ed.

<sup>2</sup> By this term Harrington means the Assembly of the Representatives of the People. — Ed.

<sup>3</sup> See an account of Harrington in 2 Pol. Sc. Quart. 1 (1885) by Professor Dwight.

But the necessary definition of a commonwealth, anything well ordered, is, that it is a government consisting of the Senate proposing, the people resolving, and the magistracy executing.

Magistracy is a style proper to the executive part: yet because in a discourse of this kind it is hardly avoidable, but that such as are of the proposing or resolving assemblies, will be sometimes comprised under this name or style, it shall be enough for excuse to say, that magistracy may be esteemed of two kinds; the one proper or executive, the other improper or legislative. — *Ib. The Art of Lawgiving*, 393 (1659).

The Humble Petition of Divers Well-affected Persons, delivered the 6<sup>th</sup> day of July, 1659. With the Parliament's Answer thereto.

To the Supreme Authority, the Parliament of the Commonwealth of England. The humble petition of divers well-affected persons shows:

That your petitioners have for many years observed the breathings and longings of this nation after rest and settlement, and that upon mistaken grounds they have been ready even to sacrifice and yield up part of their own undoubted right, to follow after an appearance of it. . . . Upon serious thoughts of the premises, your petitioners do presume with all humility, and submission to your wisdom, to offer to your Honors their principles and proposals concerning the government of this nation: whereupon, they humbly conceive, a just and prudent government ought to be established, *viz.* :—

1. That the constitution of the civil government of England by king, lords, and commons, being dissolved, whatever new constitution of government can be made or settled according to any rule of righteousness, it can be no other than a wise order or method, into which the free people's deputies shall be formed for the making of their laws, and taking care for their common safety and welfare in the execution of them: for, the exercise of all just authority over a free people, ought (under God) to arise from their own consent.

2. That the government of a free people ought to be so settled, that the governors and governed may have the same interest in preserving the government, and each other's properties and liberties respectively; that being the only sure foundation of a commonwealth's unity, peace, strength, and prosperity.

3. That there cannot be a union of the interests of a whole nation in the government, where those who shall sometimes govern, be not also sometimes in the condition of the governed; otherwise the governors will not be in a capacity to feel the weight of the government, nor the governed to enjoy the advantages of it: and then it will be the interest of the major part to destroy the government, as much as it will be the interest of the minor part to preserve it.

4. That there is no security that the supreme authority shall not fall into factions, and be led by their private interest to keep themselves always in power, and direct the government to their private advantages, if that supreme authority be settled in any single assembly whatsoever, that shall have the entire power of propounding, debating, and resolving laws.



5. That the sovereign authority in every government, of what kind soever, ought to be certain in its perpetual successions, revolutions, or descents; and without possibility (by the judgment of human prudence) of a death or failure of its being, because the whole form of the government is dissolved if that should happen, and the people in the utmost imminent danger of an absolute tyranny or a war among themselves, or rapine and confusion — And therefore where the government is popular, the assemblies in whom reside the supreme authority, ought never to die or dissolve, though the persons be annually changing: neither ought they to trust the sovereign care of the strength and safety of the people out of their own hands, by allowing a vacation to themselves, lest those that should be trusted be in love with such great authority, and aspire to be their masters, or else fear an account, and seek the dissolution of the commonwealth to avoid it.

6. That it ought to be declared as a fundamental order in the constitution of this commonwealth, that the Parliament being the supreme legislative power, is intended only for the exercise of all those acts of authority that are proper and peculiar to the legislative power; and to provide for a magistracy, to whom should appertain the whole executive power of the laws: and no case either civil or criminal to be judged in Parliament, saving that the last appeals in all cases, where appeals shall be thought fit to be admitted, be only to the popular assembly; and also that to them be referred the judgment of all magistrates in cases of maladministrations in their offices.

And in prosecution of these principles, your petitioners humbly propose for the settlement of this commonwealth, that it be ordained,

1. That the Parliament, or the supreme authority of England, be chosen by the free people, to represent them with as much equality as may be.

2. That a Parliament of England shall consist of two assemblies, the lesser of about three hundred, in whom shall reside the entire power of consulting, debating, and propounding laws: the other, to consist of a far greater number, in whom shall rest the sole power of resolving all laws so propounded.

3. That the free people of England, in their respective divisions at certain days and places appointed, shall forever annually choose one third part to each assembly, to enter into their authority, at certain days appointed: the same days, the authority of a third of each of the said assemblies to cease, only in the laying the first foundation in this commonwealth's constitution: the whole number of both the assemblies to be chosen by the people respectively, *viz.*, one third of each assembly to be chosen for one year, one third for two years, and one third for three years.

4. That such as shall be chosen, having served their appointed time in either of the said assemblies of Parliament, shall not be capable to serve in the same assembly during some convenient interval or vacation.

5. That the legislative power do wholly refer the execution of the laws to the magistracy, according to the sixth principle herein mentioned.

6. That in respect to religion and Christian liberty, it be ordained that the Christian religion by the appointment of all succeeding Parliaments, be taught, and promulgated to the nation, and public preachers thereof maintained: and that all that shall profess the said religion, though of different persuasions in parts of the doctrine, or discipline thereof, be equally protected in the peaceable profession, and public exercise of the same; and be equally capable of all elections, magistracies, preferments in the commonwealth, according to the order of the same. Provided always, that the public exercise of no religion contrary to Christianity be tolerated; nor the public exercise of any religion, though professedly Christian, grounded upon, or incorporated into the interest of any foreign State or prince. . . .

Wednesday, July the 6<sup>th</sup>, 1659. The House being informed, that divers gentlemen were at the door with a petition, they were called in, and one of the petitioners in behalf of himself and the rest said, We humbly present you a petition, to which we might have had many thousand hands, but the matter rather deserves your serious consideration than any public attestation; and therefore we do humbly present it to this honorable House. Which, after the petitioners were withdrawn, was read, and was entitled, The humble petition of divers well-affected persons.

Resolved, that the petitioners have the thanks of the House.

The petitioners were again called in, and Mr. Speaker gave them this answer:—

Gentlemen, the House has read over your petition, and find it without any private end, and only for the public interest; and I am commanded to let you know, that it lies much upon them to make such a settlement as may be most for the good of posterity: and they are about that work, and intend to go forward with it with as much expedition as may be. And for your parts, they have commanded me to give you thanks; and in their names I do give you the thanks of this House accordingly.

THO. ST. NICHOLAS, Clerk of the Parliament.

HARRINGTON, *Works* (3d ed.), 514.<sup>1</sup>

<sup>1</sup> Charles II. returned to London, May 29, 1660. — Ed.

## GODDEN v. HALES.

KING'S BENCH. 1686.

[Comberbach, 21; s. c. 2 Shower, 475.]<sup>1</sup>

DEBT upon the statute 25 Car. 2, cap. 2, for the penalty of £500, wherein the plaintiff declares, that whereas it was provided by the statute, &c. (setting forth the statute), notwithstanding which, the defendant having a commission to serve the king as a colonel of foot, and not having received the sacrament, nor taken the oaths and test, &c., within the times prescribed by the Act; that after the times expired, wherein he ought to have received the sacrament, and taken the oaths and tests, as aforesaid, he did execute the said office, and continued to act by color of the said commission, of which he was indicted and convicted at the assizes in Kent, whereby the action accrues to the plaintiff, for the penalty of £500. The defendant pleads, that before the times expired, &c., he had a dispensation under the broad seal to act, *non obstante* that statute; to which the plaintiff demurs.

*Northy, pro quer'*, Solicitor-General, for the defendant. . . .

At another day the Chief Justice [HERBERT] declared, that by the opinion of eleven of the judges, the case of 2 Hen. 7, of sheriffs holding above one year by dispensation, &c., is good law.

And as to the case in question, we have resolved the points following (Street only dissenting).

1. That the king is a sovereign (or absolute) prince.
2. That the laws of the land are the king's laws.
3. That to dispense with penal laws (where the subject hath no particular damage) for necessary and urgent occasions, is an inseparable prerogative of the king.
4. That the king is sole judge of such necessity [and] that no Act of Parliament could take away that power.
5. That this trust residing in him, came not from the people, but was a sovereign right of the king *ab antiquo*.

6. That the dispensation in this case is a good bar to the plaintiff's action, because it came within three months before any disability incurred.

*Judicium quod quer' nil capiat per Billam.*<sup>2</sup>

<sup>1</sup> This report is made up from both of these volumes. In *Comb.* 21, the case is styled *Godwin v. Hales*. — ED.

<sup>2</sup> Shower's report gives Powell, with Street, as doubting. Coxe (*Judic. Power*, 166) remarks: "The decision in this case is celebrated in English history as intimately connected with the causes of the revolution of 1688. The abolition of the royal power of dispensing with any statute, made in the first year of William and Mary, was caused by the existence of this decision. The case is discussed at length by Macaulay, who criticises both the decision and the motives of the court with great severity. The second paragraph of the Bill of Rights in the Statute of 1 William and Mary, sess. 2, cap. 2, formally declares to be illegal what the decision declared to be legal."

By Stat. 1 Wm. & Mary, c. 6 (1688) the coronation oath binds the sovereign "to govern the people of this kingdom . . . according to the statutes in Parliament

95. MEN being, as has been said, by nature all free, equal, and independent, no one can be put out of his estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. . . . 97. And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact if he be left free and under no other ties than he was in before in the state of nature. — LOCKE, *Two Treatises on Government*, book ii. c. viii. (Licensed for printing Aug. 23, 1689.)<sup>1</sup>

143. The legislative power is that which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it. But because those laws which are to be constantly executed, and whose force is always to continue, may be made in a little time; therefore there is no need that the legislative should be always in being, not having always business to do. And because it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government. Therefore in well-ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of divers persons who, duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them to take care that they make them for the public good.

144. But because the laws that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or agreed on, and the laws and customs of the same." By the Bill of Rights, Stat. 1 Wm. & Mary, sess. 2, c. 2 (1689) "the pretended power of suspending of laws or the execution of laws, by regal authority, without consent of Parliament," and also that of "dispensing with laws or the execution of laws, by regal authority, as it hath been assumed and exercised of late," are declared illegal. By the Act of Settlement, Stat. 11 & 12 Wm. III. c. 2, s. 3 (1700), it was provided that "judges' commissions be made *Quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."

For an account of the removal of judges in the seventeenth century, see 12 How. St. Tr. 257, note. — ED.

1 "With the Revolution came John Locke as its interpreter." H. MORLEY's *Introduction to the Two Treatises on Government*. — ED.

an attendance thereunto, therefore it is necessary there should be a power always in being which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power come often to be separated.

145. There is another power in every commonwealth which one may call natural, because it is that which answers to the power every man naturally had before he entered into society. For though in a commonwealth the members of it are distinct persons, still, in reference to one another, and, as such, are governed by the laws of the society, yet, in reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of nature with the rest of mankind, so that the controversies that happen between any man of the society with those that are out of it are managed by the public, and an injury done to a member of their body engages the whole in the reparation of it. So that under this consideration the whole community is one body in the state of nature in respect of all other States or persons out of its community.

146. This, therefore, contains the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth, and may be called federative if any one pleases. So the thing be understood, I am indifferent as to the name. . . .

149. Though in a constituted commonwealth standing upon its own basis and acting according to its own nature — that is, acting for the preservation of the community — there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. . . . And thus the community may be said in this respect to be always the supreme power, but not as considered under any form of government, because this power of the people can never take place till the government be dissolved.

150. In all cases whilst the government subsists, the legislative is the supreme power. For what can give laws to another must needs be superior to him, and since the legislative is no otherwise legislative of the society but by the right it has to make laws for all the parts, and every member of the society prescribing rules to their actions, and giving power of execution where they are transgressed, the legislative must needs be the supreme, and all other powers in any members or parts of the society derived from and subordinate to it.

151. In some commonwealths where the legislative is not always in being, and the executive is vested in a single person who has also a share in the legislative, there that single person, in a very tolerable sense, may also be called supreme; not that he has in himself all the supreme power, which is that of law-making, but because he has in him the supreme execution from whom all inferior magistrates derive all

their several subordinate powers, or, at least, the greatest part of them ; having also no legislative superior to him, there being no law to be made without his consent, which cannot be expected should ever subject him to the other part of the legislative, he is properly enough in this sense supreme. But yet it is to be observed that though oaths of allegiance and fealty are taken to him, it is not to him as supreme legislator, but as supreme executor of the law made by a joint power of him with others, allegiance being nothing but an obedience according to law, which, when he violates, he has no right to obedience, nor can claim it otherwise than as the public person vested with the power of the law, and so is to be considered as the image, phantom, or representative of the commonwealth, acted by the will of the society declared in its laws, and thus he has no will, no power, but that of the law. But when he quits this representation, this public will, and acts by his own private will, he degrades himself, and is but a single private person without power and without will ; the members owing no obedience but to the public will of the society.

152. The executive power placed anywhere but in a person that has also a share in the legislative is visibly subordinate and accountable to it, and may be at pleasure changed and displaced ; so that it is not the supreme executive power that is exempt from subordination, but the supreme executive power vested in one, who having a share in the legislative, has no distinct superior legislative to be subordinate and accountable to, farther than he himself shall join and consent, so that he is no more subordinate than he himself shall think fit, which one may certainly conclude will be but very little. Of other ministerial and subordinate powers in a commonwealth we need not speak, they being so multiplied with infinite variety in the different customs and constitutions of distinct commonwealths, that it is impossible to give a particular account of them all. Only thus much which is necessary to our present purpose we may take notice of concerning them, that they have no manner of authority, any of them, beyond what is by positive grant and commission delegated to them, and are all of them accountable to some other power in the commonwealth.

153. It is not necessary, no, nor so much as convenient, that the legislative should be always in being ; but absolutely necessary that the executive power should, because there is not always need of new laws to be made, but always need of execution of the laws that are made. When the legislative hath put the execution of the laws they make into other hands, they have a power still to resume it out of those hands when they find cause, and to punish for any maladministration against the laws. The same holds also in regard of the federative power, that and the executive being both ministerial and subordinate to the legislative, which, as has been showed, in a constituted commonwealth is the supreme. The legislative also in this case being supposed to consist of several persons (for if it be a single person it cannot but be always in being, and so will, as supreme, naturally have the supreme

executive power, together with the legislative), may assemble and exercise their legislative at the times that either their original constitution or their own adjournment appoints, or when they please, if neither of these hath appointed any time, or there be no other way prescribed to convoke them. For the supreme power being placed in them by the people, 't is always in them, and they may exercise it when they please, unless by their original constitution they are limited to certain seasons, or by an act of their supreme power they have adjourned to a certain time, and when that time comes they have a right to assemble and act again. — *Ib.*, cc. xii., xiii.

159. Where the legislative and executive power are in distinct hands, as they are in all moderated monarchies and well-framed governments, there the good of the society requires that several things should be left to the discretion of him that has the executive power. For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it; nay, many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require; nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of Nature and government, *viz.*, that as much as may be all the members of the society are to be preserved. For since many accidents may happen wherein a strict and rigid observation of the laws may do harm, as not to pull down an innocent man's house to stop the fire when the next to it is burning; and a man may come sometimes within the reach of the law which makes no distinction of persons, by an action that may deserve reward and pardon; it is fit the ruler should have a power in many cases to mitigate the severity of the law, and pardon some offenders, since the end of government being the preservation of all as much as may be, even the guilty are to be spared where it can prove no prejudice to the innocent.

160. This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative; for since in some governments the law-making power is not always in being and is usually too numerous, and so too slow for the despatch requisite to execution, and because, also, it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public, or make such laws as will do no harm, if they are executed with an inflexible rigor on all occasions and upon all persons that may come in their way, therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe.

161. This power, whilst employed for the benefit of the community and suitably to the trust and ends of the government, is undoubted prerogative, and never is questioned. For the people are very seldom or never scrupulous or nice in the point; they are far from examining prerogative whilst it is in any tolerable degree employed for the use it was meant—that is, the good of the people, and not manifestly against it. . . .

168. The old question will be asked in this matter of prerogative, “But who shall be judge when this power is made a right use of?” I answer: Between an executive power in being, with such a prerogative, and a legislative that depends upon his will for their convening, there can be no judge on earth. As there can be none between the legislative and the people, should either the executive or the legislative, when they have got the power in their hands, design, or go about to enslave or destroy them, the people have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to Heaven; for the rulers, in such attempts exercising a power the people never put into their hands, who can never be supposed to consent that anybody should rule over them for their harm, do that which they have not a right to do. And where the body of the people, or any single man, are deprived of their right, or are under the exercise of a power without right, having no appeal on earth they have a liberty to appeal to Heaven whenever they judge the cause of sufficient moment. And therefore, though the people cannot be judge, so as to have, by the constitution of that society, any superior power to determine and give effective sentence in the case, yet they have reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, by a law antecedent and paramount to all positive laws of men, whether they have just cause to make their appeal to Heaven. — *Ib.*, c. xiv.<sup>1</sup>

## WINTHROP v. LECHMERE.

PRIVY COUNCIL. 1727–28.

[4 *Conn. Hist. Soc. Coll.*, 94 n.; 5 *Mass. Hist. Soc. Coll.* (6th Series), 440–511.]

WAIT STILL WINTHROP, commonly called Wait Winthrop, formerly Chief Justice of the Superior Court of Judicature of Massachusetts, died intestate in 1717, leaving a considerable estate in Connecticut. His two children were John Winthrop of Connecticut, and Anne, wife of Thomas Lechmere of Boston. John became administrator of the estate, and claimed all the real estate, under the common law of England. Lechmere, in right of his wife, claiming a share of the real

<sup>1</sup> For certain passages from Montesquieu (1748), Rousseau (1762), and Blackstone (1765), see *ante*, p. 2. — ED.



estate under an Act of the colony of Connecticut, which divided an intestate's property among his children, began proceedings in the Probate Court of that colony to enforce his claim. After a long litigation the Superior Court of Connecticut, in 1725-26, vacated Winthrop's letters of administration, and substituted, in his place, Lechmere and his wife. Winthrop sought relief from the General Assembly, threatening an appeal to the King in Council. He was taken into custody for contempt; but escaped (as it was alleged), and went to England, where he brought his appeal. The General Assembly, in March, 1726, passed an Act authorizing Lechmere to sell a part of the real estate.

Winthrop's "Brief in Appeal," together with short memoranda of the arguments of counsel on the other side, are found in the volume of the Massachusetts Historical Society, mentioned above, pp. 440-496. The Decree is given in the same volume, pp. 496-511.

It appears (pp. 457, 461, 463) that Winthrop's claim, before the courts in Connecticut, was under "the law and custom of England . . . the said law of the colony notwithstanding,"—"both by Act of Parliament and by the Royal Charter;" that he was denied an appeal (p. 460), "the court saying they were not under your Majesty's government, and their charter knew nothing of your Majesty in Council." He argued, in part, as follows (p. 484): "The appellant insists the Assembly granting the said Lechmere a power to sell the lands of the intestate to pay the debt and costs in Lechmere's petition to the Assembly mentioned without hearing your petitioner, the undoubted heir to such lands, and leaving Lechmere to sell what part thereof and in what manner he saw proper, is against the common and statute law of this realm, and destructive of the liberty and property of the subject, and against reason, and as such contrary to the royal charter of the province, and the Assembly fining the appellant in £20 for his opposing the said measures was equally unwarrantable and unjustifiable. . . .

"What Lechmere's counsel will insist on to support the whole of his proceedings is a printed Act they find amongst the Connecticut printed laws, fol. 60, entitled an Act for Settlement of Intestates' Estates. . . . [Here the statute is recited, by which it appears that an intestate's real and personal estate, after providing for the widow's dower, was to go equally to the children, except that the oldest son had a double portion.]

"But as to this Act we answer and insist (first) that it is an obsolete Act, made in the infancy of the province, and long since out of use and not of any force or regard in the province, and the time when it was made does not appear save that it was made when courts of assistants were also in use there, which have been long since abolished, which is plainly evidenced from the loss Lechmere was at what steps to take in this affair, and from the extraordinary applications of Lechmere for an interposition of the Assembly therein, and there is not the least proof made by Lechmere of this being a law in force or practised at this time in Connecticut, though we insisted before the

courts below that notwithstanding this law we were entitled to the whole real estate of our father; though if this law was not obsolete, we insist (secondly) that the same is void in itself as being not warranted by the Charter, and can no ways influence the present case. For by the Charter their power of making laws is restrained and limited in a very special manner (namely), such laws must be wholesome and reasonable, and [not] contrary to the laws of this realm of England, and then by the charter the inhabitants may have, take, possess, &c., lands, &c., and the same dispose of as other the liege people of the realm of England, and were to enjoy all liberties and immunities of natural-born subjects, and the soil of the whole province is granted to the governor and company, and their successors and assigns forever, upon trust and for the use and benefit of themselves and their associates, their heirs and assigns, to be holden of his Majesty, as of the manor of East Greenwich in free and common socage.

“By the common law of England, which is what the Charter has a view to, it is undoubted that real estates descend to the eldest son of him that was last seized in fee as his heir-at-law, and neither an administrator nor an ecclesiastical court have anything to do therewith, and by the law of England an only daughter cannot be co-heir with an only son, but the son is absolute and sole heir to the father, and must as such inherit his real estate undevise by will, and we take it that where an estate of inheritance is granted under the Great Seal of Great Britain, which this Charter does, that the same is descendible according to the course of the common law, and we also take it that all our plantations carry with them the common law of their mother country, which prevails in all the plantations, and we know of no part of the plantations but where real estates descend to the heir-at-law as with us, and the first governor, the appellant's grandfather, on receiving the Charter, was obliged to swear before a Master in Chancery that he and his successors would observe and keep the common law of England. There have been also several Acts of Parliament passed here which as we apprehend support the right of descent, and by the Charter the tenure of the lands in Connecticut is declared to be held under the Crown as lord of the fee under the most free tenure possible, and it is against reason as well as law that an only daughter should be co-heir with an only son. We therefore insist this law is null and void, as being contrary to the law of this realm, unreasonable, and against the tenor of their Charter, and consequently the province had no power to make such a law and the same is void.

“Note. The laws of Connecticut are not by their Charter directed to be laid before the Crown for their approbation or disallowance, so that there is no other way to avoid any laws they shall make but by seeing if they are agreeable to the powers of their Charter, which if they are not, then we apprehend they cannot be considered as any laws at all, since a formal repeal of them cannot be had otherwise than by voiding the Charter. . . .

“What we are to pray is,

“First, That the resolve of the General Assembly declaring Lechmere might and ought to be relieved by the Court of Probates may be declared null and void.

“Secondly, That the inventory tendered by us to the Court of Probates of all our father's personal estate may be declared a right and proper inventory, and ought to be accepted as such, and that the sentences rejecting the same may be reversed.

“Thirdly, That the sentence of the Superior Court granting administration to Mr. Lechmere and his wife may be reversed and set aside, and Lechmere's action demanding the same be dismissed.

“Fourthly, That the administration granted to Lechmere may be called in and vacated, and the administration before granted to the appellant ordered to stand.

“Fifthly, That the inventory exhibited by Mr. Lechmere and his wife of the appellant's real estate, and also of his charges, and the debt due to Lattemore, may be vacated and taken off the file, and the order allowing the same and directing the same to be recorded may be discharged.

“Sixthly, That the order of the General Assembly empowering the said Lechmere to sell the appellant's lands, and the order of the Superior Court founded thereon, dated 27 Sept., 1726, allowing of Lechmere's making such sale, and the sale itself, may be declared null and void, and expurged the record; and generally.

“Seventhly, That all which Mr. Lechmere hath done under the said administration, together with the said law for settling intestate's estates may be declared void, and that the appellant is entitled to succeed to the real estate of his father as heir-at-law, according to the common law of the land. . . .

“If they should oppose our going into the merits for that we ought to have appealed to the Assembly, that is overruled by his Majesty's having allowed us an appeal. Besides, we have before shown the Assembly to be no court of judicature, and that the judgment of the Superior Court is final there, and in all appeals from that province hither the same have been from the judgments of the Superior Court.”

The Decree, Feb. 15, 1727–28 (p. 496), was as follows:—

“Upon reading this day at the Board a report from the Right Honorable the Lords of the Committee for hearing appeals from the plantations, dated the 20th day of December last, in the words following, viz. . . . [Here the matter of the petition is set forth at large.]

“Their Lordships having heard all parties concerned by their counsel learned in the law on the said petition and appeal, and there being laid before their Lordships an Act passed by the Governor and Company of that colony entitled An Act for the Settlement of Intestates' Estates, by which act (amongst other things) administrators of persons dying intestate are directed to inventory all the estate whatsoever

of the person so deceased, as well movable as not movable, and to deliver the same upon oath to the Court of Probates, and by the said Act (debts, funerals, and just expenses of all sorts, and the dower of the wife (if any) being first allowed) the said Court of Probates is empowered to distribute all the remaining estate of any such intestate, as well real as personal, by equal portions to and amongst the children and such as legally represent them, except the eldest son who is to have two shares or a double portion of the whole, the division of the estate to be made by three sufficient freeholders on oath, or any two of them, to be appointed by the Court of Probates: Their Lordships, upon due consideration of the whole matter, do agree humbly to report as their opinion to your Majesty, that the said Act for the Settlement of Intestates' Estates should be declared null and void, being contrary to the laws of England, in regard it makes lands of inheritance distributable as personal estates, and is not warranted by the Charter of that colony; and that the said three sentences of the 29th of June, 1725, of 28th September, 1725, and of the 22d day of March, 1725-6 . . . may be all reversed and set aside. . . . [Here follow other matters which are all included in what follows.]

“ His Majesty, taking the same into his royal consideration, is pleased, with the advice of his Privy Council, to approve of the said report, and confirm the same in every particular part thereof, and pursuant thereunto to declare that the aforementioned Act entitled An Act for the Settlement of Intestates' Estates is null and void, and the same is hereby accordingly declared to be null and void and of no force or effect whatever. And his Majesty is hereby further pleased to order, that all the aforementioned sentences of the 29th of June, 1725, of the 28th of September, 1725, and of the 22d of March, 1725-6, and every of them, be and they are hereby reversed and set aside; and that the petitioner, John Winthrop, be and he is hereby admitted to exhibit an inventory of the personal estate only of the said intestate, and that the Court of Probates do not presume to reject such inventory, because it does not contain the real estate of the said intestate. And his Majesty doth hereby further order, that the aforementioned sentence of the 22d of March, 1725-6, vacating the said letters of administration granted to the petitioner and granting administration to the said Thomas and Anne Lechmere, be also reversed and set aside; and that the said letters of administration so granted to the said Thomas Lechmere and Anne his wife be called in and vacated; and that the said inventory of the said real estate exhibited by the said Thomas Lechmere and Anne his wife be vacated. And that the order of the 29th of April, 1726, approving of the said inventory, and ordering the same to be recorded, be discharged and set aside; and that the original letters of administration so granted to the petitioner be and they are hereby established and ordered to stand. And that all such costs as the petitioner hath paid unto the said Thomas Lechmere by direction of the said sentences, all, every, or any of them, be forth-

with repaid to him by the said Thomas Lechmere; and that the suit brought by the said Thomas Lechmere and Anne his wife, on which the said sentences were made, be and they are hereby dismissed; and that all acts and proceedings done and had under the said sentences, all, every, or any of them, or by virtue or pretence thereof, be and they are hereby discharged and set aside and declared null and void. And his Majesty is further pleased to declare, that the aforementioned Act of Assembly passed in May, 1726, empowering the said Thomas Lechmere to sell the said lands, is null and void; and also that the said order made by the said Superior Court, and bearing date the 27th of September, 1726, pursuant to the said Act of Assembly allowing the said Lechmere to sell of the said real estate to the value of ninety pounds current money there for his charges, and three hundred and eighteen pounds silver money, is likewise null and void; and the said Act of Assembly and order of the said Superior Court are accordingly hereby declared null and void, and of no force or effect whatever. And his Majesty doth hereby likewise further order, that the petitioner be immediately restored and put into the full, peaceable, and quiet possession of all such parts of the said real estate as may have been taken from him, under pretence of or by virtue or color of the said sentences, orders, acts, and proceedings, or any of them; and that the said Thomas Lechmere do account for and pay to the said petitioner the rents and profits thereof, and of every part thereof, received by him, or any one under him, for and during the time of such his unjust detention thereof. And the Governor and Company of his Majesty's Colony of Connecticut for the time being, and all other officers and persons whatsoever whom it may concern, are to take notice of his Majesty's royal pleasure hereby signified, and yield due obedience to every particular part thereof, as they will answer the contrary at their peril."<sup>1</sup>

<sup>1</sup> Coxe (Judic. Power, 212) expresses the opinion that this decree, in so far as it dealt with the Intestates' Act, was a legislative, and not a judicial proceeding; he concedes that in other respects it was judicial. As authority for this view, he refers to the fact that in a subsequent order in council of April 10, 1730, it "is expressly called 'a repeal' of that Act;" and he cites 4 Collections Conn. Hist. Soc. 201. This may well be doubted. The proceedings, given above in the text, speak for themselves. As regards the order of 1730, the passage cited by Coxe occurs in a recital of the petition of the Connecticut Commissioners, "humbly praying that notwithstanding the said Act is repealed," &c. The language of the Committee of the Council itself (p. 202) is different; it runs thus: "His Majesty was pleased to declare an Act . . . to be null and void."

It may be added that Winthrop, in a counter petition to the Committee of the Council, on occasion of the proceedings of 1730 (4 Conn. Hist. Soc. Coll. 393), uses the following language as regards the former case:—

"This Act being for the reasons above mentioned, in its own nature null, void, and repugnant to the very powers granted by King Charles the Second, it is a gross mistake in the petitioners to allege that the same was annulled by his Majesty's order in Council of the 5th [15th] of February, 1727. Whereas his Majesty did, upon counsel heard on both sides thereof, only relieve your memorialist as a subject and an inhabitant of the Province of Connecticut, who resorted to his royal justice for relief against

## CAMPBELL v. HALL.

KING'S BENCH. 1774.

[*Cowper*, 204.]

THIS case was very elaborately argued four several times; and now on this day LORD MANSFIELD stated the case, and delivered the unanimous opinion of the court, as follows:

This is an action that was brought by the plaintiff, James Campbell, who is a natural-born subject of this kingdom, and who, upon the 3d of March, 1763, purchased a plantation in the island of Grenada: and it is brought against the defendant, William Hall, who was a collector for his Majesty of a duty of four and an half per cent upon all goods and sugars exported from the island of Grenada. And the action is brought to recover back a sum of money which was paid, as this duty of four and an half per cent, upon sugars that were exported from the island of Grenada, by and on account of the plaintiff. The action is an action for money had and received; and it is brought upon this ground; namely, that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received it, not having been imposed by lawful or sufficient authority to warrant the same. It is stated by the special verdict, that that money still remains in the hands of the defendant, not paid over by him to the use of the king, but continued in his hands, and so continues with the privity and consent of his Majesty's Attorney-General, for the express purpose of trying the question as to the validity of imposing this duty.

It came on to be tried at Guildhall, and of course, from the nature of the question, both sides came prepared to have a special verdict; and a special verdict was found, which states as follows.

That the island of Grenada was taken by the British arms, in open war, from the French king.

That the island of Grenada surrendered upon capitulation, and that the capitulation on which it surrendered, was by reference to the capitulation upon which the island of Martinique had before surrendered.

The special verdict then states some articles of the capitulation, and particularly the 5th article, by which it is agreed, that Grenada should continue to be governed by its present laws until his Majesty's further pleasure be known. It next states the 6th article; where, to a de-

the oppression of a Court of Probates acting without any legal jurisdiction, under the pretended authority of an Act of Assembly, which being contrary to law and to their charter was in itself void and null, even before his Majesty for the future information of his Majesty's subjects in Connecticut was graciously pleased to declare it so."

This seems to be a just exposition of the nature of the decree in *Winthrop v. Lechmere*. The word "annulling," however, is often used to-day to describe the effect of judicial action in such cases, — as the equivalent of the phrase declaring null and void. — ED.

mand of the inhabitants of Grenada, requiring that they should be maintained in their property and effects, movable and immovable, of what nature soever, and that they should be preserved in their privileges, rights, honors, and exemptions; the answer is, the inhabitants, being subjects of Great Britain, will enjoy their properties and privileges in like manner as the other his Majesty's subjects in the other British Leeward Islands: so that the answer is, that they will have the consequences of their being subjects, and that they will be as much subjects as any of the other Leeward Islands.

Then it states another article of the capitulation; viz., the 7th article, by which they demand, that they shall pay no other duties than what they before paid to the French king; that the capitation tax shall be the same, and that the expenses of the courts of justice, and of the administration of government, should be paid out of the king's demesne: in answer to which they are referred to the answer I have stated, as given to the foregoing article; that is, being subjects they will be entitled in like manner as the other his Majesty's subjects in the British Leeward Islands.

The next thing stated in the special verdict is, the treaty of peace signed the 10th February, 1763; and it states that part of the treaty of peace by which the island of Grenada is ceded, and some clauses which are not at all material for me to state.

The next instrument is a proclamation under the great seal, bearing date the 7th of October, 1763, wherein amongst other things it is said as follows:

Whereas it will greatly contribute to the speedy settling our said governments, of which the island of Grenada is one, that our loving subjects should be informed of our paternal care for the security of the liberties and properties of those who are and shall become inhabitants thereof: we have thought fit to publish and declare by this our proclamation, that we have in our letters-patent under our great seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of the said colonies respectively, that so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies, within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces of America which are already under our immediate government; and we have also given power to the said governors, with the consent of our said councils, and the representatives of the people to be summoned as aforesaid, to make, constitute, and ordain laws, statutes, and ordinances, for the public peace, welfare, and good government of our said colonies and the inhabitants thereof, as near as may be agreeable to the laws of England, and under such regulations and restrictions as are used in our other colonies.

The next instrument stated in the special verdict, is the letters-patent

under the great seal, or rather a proclamation, bearing date the 26th March, 1764; wherein, the king recites a survey and division of the ceded islands, and that he had ordered them to be divided into allotments, as an invitation to purchasers to come in and purchase upon the terms and conditions specified in that proclamation.

The next instrument stated, is the letters-patent under the great seal, bearing date the 9th of April, 1764. In these letters there is a commission appointing General Melville governor, with a power to summon an assembly as soon as the state and circumstances of the island would admit, and to make laws with consent of the governor and council, with reference to the manner of the other assemblies of the king's provinces in America. This instrument is dated the 9th of April, 1764. The governor arrived in Grenada on the 14th December, 1764, and before the end of the year 1765, an assembly actually met in the island of Grenada. But before the arrival of the governor at Grenada, indeed before his departure from London, there is another instrument upon the validity of which the whole question turns, which instrument contains letters-patent under the great seal, bearing date the 20th July, 1764. Wherein, the king reciting, that whereas, in Barbadoes, and in all the British Leeward Islands, there was a duty of four and an half per cent upon all sugars, &c., exported; and reciting in these words; that whereas it is reasonable and expedient, and of importance to our other sugar islands, that the like duty should take place in our said island of Grenada; proceeds thus: We have thought fit, and our royal will and pleasure is, and we do hereby, by virtue of our prerogative royal, order, direct, and appoint, that from and after the 29th day of September next ensuing the date of these presents, a duty or impost of four and an half per cent in specie shall be raised and paid to us, our heirs and successors, upon all dead commodities, the growth and produce of our said island of Grenada, that shall be shipped off from the same, in lieu of all customs and import duties, hitherto collected upon goods imported and exported into and out of the said island, under the authority of his most Christian Majesty.

The special verdict then states that in fact this duty of four and an half per cent is paid in all the British Leeward Islands, and sets forth the several Acts of Assembly relative to these duties. They are public Acts: therefore, I shall not state them, as any gentleman may have access to them; they depend upon different circumstances and occasions, but are all referable to those duties in our islands. This, with what I set out with in the opening, is the whole of the special verdict that is material to the question.

The general question that arises out of all these facts found by the special verdict, is this: whether the letters-patent under the great seal, bearing date the 20th July, 1764, are good and valid to abolish the French duties; and in lieu thereof to impose the four and half per cent duty above mentioned, which is paid in all the British Leeward Islands?



It has been contended at the Bar, that the letters-patent are void on two points; the first is, that although they had been made before the proclamation of the 7th October, 1763, yet the king could not exercise such a legislative power over a conquered country.

The second point is, that though the king had sufficient power and authority before the 7th October, 1763, to do such legislative act, yet before the letters-patent of the 20th July, 1764, he had divested himself of that authority.

A great deal has been said, and many authorities cited, relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed, are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:

A country conquered by the British arms becomes a dominion of the king in the right of his crown; and, therefore, necessarily subject to the legislature, the Parliament of Great Britain.

The 2d is, That the conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, That the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, That the law and legislative government of every dominion equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives.

The 5th, That the laws of a conquered country continue in force until they are altered by the conqueror: the absurd exception as to Pagans, mentioned in *Calvin's Case*, shows the universality and antiquity of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until his Majesty's further pleasure be known.

The 6th and last proposition is, that if the king (and when I say the king, I always mean the king without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.

But the present change, if it had been made before the 7th October, 1763, would have been made recently after the cession of Grenada by treaty, and is in itself most reasonable, equitable, and political; for it is putting Grenada, as to duties, on the same footing with all the British Leeward Islands. If Grenada paid more it would have been detrimental to her; if less, it must be detrimental to the other Leeward Islands: nay, it would have been carrying the capitulation into execution, which gave the people of Grenada hopes, that if any new tax was laid on, their case would be the same with their fellow-subjects in the other Leeward Islands.

The only question then on this first point is, Whether the king had a power to make such change between the 10th of February, 1763, the day the treaty of peace was signed, and the 7th October, 1763? Taking these propositions to be true which I have stated, the only question is, Whether the king had of himself that power?

It is left by the Constitution to the king's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion.

To go into the history of the conquests made by the Crown of England.

The conquest and the alteration of the laws of Ireland have been variously and learnedly discussed by lawyers and writers of great fame, at different periods of time: but no man ever said, that the change in the laws of that country was made by the Parliament of England: no man ever said the Crown could not do it. The fact in truth, after all the researches which have been made, comes out clearly to be, as it is laid down by Lord Chief Justice Vaughan, that Ireland received the laws of England, by the charters and commands of Hen. 2, King John, Hen. 3, and he adds an *et cætera* to take in Ed. 1 and the subsequent kings. And he shows clearly the mistake of imagining that the charters of the 12th of John were by the assent of a Parliament of Ireland. Whenever the first Parliament was called in Ireland, that change was introduced without the interposition of the Parliament of England; and must, therefore, be derived from the Crown.

Mr. Barrington is well warranted in saying that the statute of Wales, 12th Ed. 1st, is certainly no more than regulations made by the king in his council, for the government of Wales, which the preamble says was then totally subdued. Though, for various political purposes, he feigned Wales to be a fief of his crown; yet he governed it as a conquest. For Ed. 1st never pretended that he could, without the assent of Parliament, make laws to bind any part of the realm.

Berwick, after the conquest of it, was governed by charters from the Crown without the interposition of Parliament, till the reign of Jac. 1st.

All the alterations in the laws of Gascony, Guienne, and Calais, must have been under the king's authority; because all the Acts of Parliament relative to them are extant. For they were in the reign of Edward 3d, and all the Acts of Parliament of that time are extant. There are some Acts of Parliament relative to each of these conquests that I have named, but none for any change of their laws, and particularly with regard to Calais, which is alluded to as if their laws were considered as given by the Crown.

Besides the garrison, there are inhabitants, property, and trade in Gibraltar: ever since that conquest the king has made orders and regulations suitable to those who live, &c., or trade, or enjoy property in a garrison town.

The Attorney-General alluded to a variety of instances, and several very lately, in which the king had exercised legislation in Minorca: there, there are many inhabitants, much property, and trade. If it is said, that the king does it as coming in the place of the King of Spain, because their old constitution remains, the same argument holds here. For before the 7th October, 1763, the original Constitution of Grenada continued, and the king stood in place of their former sovereign.

After the conquest of New York, in which most of the old Dutch inhabitants remained, King Charles 2d changed the form of their constitution and political government, by granting it to the Duke of York, to hold of his Crown, under all the regulations contained in the letters-patent.

It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before, but that the king has a right to a legislative authority over a conquered country; it was never denied in Westminster Hall; it never was questioned in Parliament. Coke's Report of the arguments and resolutions of the judges in *Calvin's Case* lays it down as clear. If a king (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of Parliament. It is plain he alludes to his own country, because he alludes to a country where there is a parliament.

The authority also of two great names has been cited, who take the proposition for granted. In the year 1722, the Assembly of Jamaica being refractory, it was referred to Sir Philip Yorke and Sir Clement Wearge, to know "what could be done if the Assembly should obstinately continue to withhold all the usual supplies." They reported thus: "If Jamaica was still to be considered as a conquered island, the king had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other colonies, no tax could be imposed on the inhabitants but by an Assembly of the island, or by an Act of Parliament."

They considered the distinction in law as clear, and an indisputable consequence of the island being in the one State or in the other. Whether it remained a conquest, or was made a colony, they did not examine. I have upon former occasions traced the Constitution of Jamaica, as far as there are papers and records in the offices, and cannot find that any Spaniard remained upon the island so late as the Restoration; if any, there were very few. To a question I lately put to a person well informed and acquainted with the country, his answer was, there were no Spanish names among the white inhabitants, there were among the negroes. King Charles 2d by proclamation invited settlers there, he made grants of lands: he appointed at first a governor and council only: afterwards he granted a commission to the governor to call an assembly.

The constitution of every province, immediately under the king, has arisen in the same manner; not from grants, but from commissions to call assemblies: and, therefore, all the Spaniards having left the island or been driven out, Jamaica from the first settling was an English colony, who under the authority of the king planted a vacant island, belonging to him in right of his crown; like the cases of the island of St. Helena and St. John, mentioned by Mr. Attorney-General.

A maxim of constitutional law as declared by all the judges in *Calvin's Case*, and which two such men, in modern times, as Sir Philip Yorke and Sir Clement Wearge, took for granted, will require some authorities to shake.

But on the other side, no book, no saying, no opinion has been cited; no instance in any period of history produced, where a doubt has been raised concerning it. The counsel for the plaintiff no doubt labored this point from a diffidence of what might be our opinion on the second question. But upon the second point, after full consideration we are of opinion, that before the letters-patent of the 20th July, 1764, the king had precluded himself from the exercise of a legislative authority over the island of Grenada.

The first and material instrument is the proclamation of the 7th October, 1763. See what it is that the king there says, with what view, and how he engages himself and pledges his word.

"For the better security of the liberty and property of those who are or shall become inhabitants of our island of Grenada, we have declared by this our proclamation, that we have commissioned our governor (as soon as the state and circumstances of the colony will admit) to call an assembly to enact laws," &c. With what view is this made? It is to invite settlers and subjects: and why to invite. That they might think their properties, &c., more secure if the legislation was vested in an assembly, than under a governor and council only.

Next, having established the constitution, the proclamation of the 20th March, 1764, invites them to come in as purchasers: in further confirmation of all this, on the 9th April, 1764, three months before July, an actual commission is made out to the governor to call an

assembly as soon as the state of the island would admit thereof. You observe, there is no reservation in the proclamation of any legislature to be exercised by the king, or by the governor and council under his authority in any manner, until the assembly should meet; but rather the contrary: for whatever construction is to be put upon it, which, perhaps, may be very difficult through all the cases to which it may be applied, it alludes to a government by laws in being, and by courts of justice, not by a legislative authority, until an assembly should be called. There does not appear from the special verdict, any impediment to the calling an assembly immediately on the arrival of the governor, which was in December, 1764. But no assembly was called then or at any time afterwards, till the end of the year 1765.

We therefore think, that by the two proclamations and the commission to Governor Melville, the king had immediately and irrecoverably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council, in like manner as the other islands belonging to the king.

Therefore, though the abolishing the duties of the French king and the substituting this tax in its stead, which according to the finding in this special verdict is paid in all the British Leeward Islands, is just and equitable with respect to Grenada itself, and the other British Leeward Islands, yet, through the inattention of the king's servants, in inverting the order in which the instruments should have passed, and been notoriously published, the last act is contradictory to, and a violation of the first, and is, therefore, void. How proper soever it may be in respect to the object of the letters-patent of the 20th July, 1764, to use the words of Sir Philip Yorke and Sir Clement Wearge, "it can only now be done, by the assembly of the island, or by an Act of the Parliament of Great Britain."

The consequence is, judgment must be given for the plaintiff.

## SECTION II.

## WRITTEN CONSTITUTIONS IN THE UNITED STATES.

NOTE TO PAXTON'S CASE OF THE WRIT OF ASSISTANCE<sup>1</sup> (QUINCY'S REP. 51). (1761.)

[Quincy's Rep., Appendix I. 520.]

BUT Otis, while he recognized the jurisdiction of Parliament over the Colonies, denied that it was the final arbiter of the justice and constitutionality of its own acts; and relying upon words of the greatest English lawyers, and putting out of sight the circumstances under which they were uttered, contended that the validity of statutes must be judged by the courts of justice; and thus foreshadowed the principle of American Constitutional Law, that it is the duty of the judiciary to declare unconstitutional statutes void.

His main reliance was the well-known statement of Lord Coke in *Dr. Bonham's Case*—"It appeareth in our books, that in many cases the common law will control Acts of Parliament and adjudge them to be utterly void; for where an Act of Parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge it to be void."<sup>2</sup> Otis seems also to have

<sup>1</sup> By Horace Gray, Jr., Esq., now Mr. Justice Gray, of the Supreme Court of the United States.

I am indebted to the publishers, Messrs. Little, Brown & Co., and to Josiah Quincy, Esq., of Boston, the owner of the copyright, for permission to reprint here this valuable note. Quincy's Reports were published in 1865.—Ed.

<sup>2</sup> 8 Rep. 118 a, quoted by Otis, *ante* [Quincy], 474. *Dr. Bonham's Case* (so far as is material to exhibit this point) was an action of false imprisonment, brought against the president and censors of the College of Physicians in London, for committing the plaintiff to jail for practising medicine in London without their license. The defendants justified, on the ground that it was granted in their charter, and since confirmed by Act of Parliament, that no one should practise medicine in London without license from them, under penalty of 100s. for each month, one half to the king, and one half to the college: and it was moreover granted that they should have the supervision of all physicians practising in London, and the punishment of them for malpractice, and the scrutiny of all medicines: "so that the punishment of the same physicians so delinquent in the premises might be by fine and imprisonment, and other suitable manner." Coke, C. J., Warburton & Daniel, JJ., gave judgment for the plaintiff upon two points: 1st. That the defendants had no power to commit the plaintiff for the cause alleged. 2d. That if they had such power, they had not pursued it. 116 b, 117 a, 121 a. The 2d point need not be further noticed here.

Of the first point "the cause and reason shortly was" that the clause giving the power to fine and imprison did not apply to those practising without license, but only to those who were guilty of malpractice. "And that was made manifest by five reasons, which were called *vivida rationes*, because they had their vigor and life from the letters-patent and the Act itself," "by construction, and conferring all the parts of them together." 117 a. "And all these reasons were proved by two grounds or maxims in law: 1. *Generalis clausula non porrigitur ad ea quæ specialiter sunt comprehensa.*" 118 b. "2. *Verba posteriora propter certitudinem addita ad priora quæ certitudine indigent sunt referenda.*" 119 a.

The fourth of the reasons thus derived from the whole context, and supported by

had in mind the equally familiar *dictum* of Lord Hobart — "Even an Act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself :

legal maxims for restraining the application of general words, was this : "The censors cannot be judges, ministers, and parties ; judges to give sentence or judgment ; ministers to make summons ; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse iudex in propria causa, imo iniquum est aliquem sue rei esse judicem* ; and one cannot be judge and attorney for any of the parties." "And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void : for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void." 118 a. And see *S. C.* 2 Brownl. 265.

When this passage was made one of the points of attack against him, Coke called the king's attention to the fact (which had been omitted in the questions drawn up by his enemies, Lord Chancellor Ellesmere and Sir Francis Bacon) that the words of his report did "not import any new opinion, but only a relation of such authorities of law, as had been adjudged and resolved in ancient and former times, and were cited in the argument of *Bonham's Case* ;" "and therefore the beginning is, It appeareth in our books, etc. And so it may be explained, as it was truly intended." 6 Bacon's Works (ed. 1824), 400, 405, 407. One of the authorities thus referred to was the remark of Herle, C. J., in *Tregor v. Vaughan*, 8 E. 3, 30, that "some statutes are made against law and right, which they that made them, perceiving, would not put them in execution." The others are either cases in which a limited construction had been given to general words in order to avoid an absurdity ; or instances of rejecting repugnant or unfavorable provisions, as in other English and American cases. *Case of Alton Woods*, 1 Rep. 47. *Cromwell's Case*, 4 Rep. 13. Jenk. Cent. 196, pl. 4. *Riddle v. White*, Gwillim's Tithe Cases, 1387. *United States v. Cantril*, 4 Cranch, 167. *Sullivan v. Robbins*, 3 Gray, 476. *Campbell's Case*, 2 Bland, 232. *Cheezem v. State*, 2 Ind. 149.

In a later case Coke is reported to have said "that Fortescue and Littleton and all others agreed, that the law consists of three parts : First, Common Law : Secondly, Statute Law, which corrects, abridges, and explains the common law : The third, Custom, which takes away the common law : but the common law corrects, allows, and disallows, both statute law and custom ; for if there be repugnancy in statute, or unreasonableness in custom, the common law disallows and rejects it, as it appears by *Dr. Bonham's Case*," &c. *Rowles v. Mason*, 2 Brownl. 197, 198. In his first Institute he repeats the same classification, adding, "The common law hath no controller in any part of it, but the High Court of Parliament." Co. Lit. 115 b. Again he says, in a passage which seems to have been cited by Otis (*ante*, 56), "the surest construction of a statute is by the rule and reason of the common law." Co. Lit. 272 b. *S. P. Harbert's Case*, 3 Rep. 13 b. And in his second Institute, in commenting on the 12th chapter of Magna Charta, declaring that assizes should "not be taken except in their own counties," and on the apparently repugnant decision that "if a man be disseised of a comote or lordship marcher in Wales, holden of the king *in capite*," the assize should be taken in an adjoining county in England, he says, "the reason is notable, for the Lord Marcher, though he had *jura regalia*, yet could not he doe justice in his owne case." "Hereby it appeareth (that I may observe it once for all) that the best expositors of this and all other statutes are our bookes and use or experience." 2 Inst. 25.

The same rules of construction have prevailed ever since. Acts of Parliament are always to be construed according to the common law and natural right, even if it should be necessary for this purpose to adopt what would otherwise be a forced construction. *Fulmerston v. Steward*, Plow. 109. *Sheffield v. Ratcliffe*, Hob. 346. *Williams v. Pritchard*, 4 T. R. 3. *The King v. Inhabitants of Cumberland*, 6 T. R. 194. Dwaris on Sts. (2d ed.) 484, 623. The rule has been thus expressed by one of the most exact of modern English judges : "The rule by which we are to be guided in construing Acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice ; and if it should, so to vary

for *jura naturæ sunt immutabilia*, and they are *leges legum*.”<sup>1</sup> Lord Holt is reported to have said, “What my Lord Coke says in *Dr. Bonham's Case* in his 8 Rep is far from any extravagancy, for it is a very reasonable and true saying, That if an Act of Parliament should ordain that the same person should be party and judge, or what is the same thing, judge in his own cause, it would be a void Act of Parliament.”<sup>2</sup>

and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done.” Parke, B., in *Perry v. Skinner*, 2 M. & W. 476.

For an example of American opinion upon this subject, it is sufficient to quote from Chief Justice Marshall the following “principles in the exposition of statutes:” “An Act of Congress ought never to be construed to violate the Law of Nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the Law of Nations as understood in this country.” “Every part of the statute is to be considered, and the intention of the legislature to be extracted from the whole;” and “where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain, in which case it must be obeyed.” *Murray v. The Charming Betsey*, 2 Cranch, 118. *United States v. Fisher*, 1b. 386.

The same doctrine has been applied to the construction of a written constitution. Chief Justice Parsons, and his associates (and afterwards in turn successors) Justices Sewall and Parker, in an opinion given to the Massachusetts House of Representatives in 1811, said: “The natural import of the words of any legislative Act, according to the common use of them, when applied to the subject-matter of the Act, is to be considered as expressing the intention of the legislature; unless the intention, so resulting from the ordinary import of the words, be repugnant to sound, acknowledged principles of national policy. And if that intention be repugnant to such principles of national policy, then the import of the words ought to be enlarged or restrained, so that it may comport with those principles; unless the intention of the legislature be clearly and manifestly repugnant to them. For although it is not to be presumed that a legislature will violate principles of public policy, yet an intention of the legislature, repugnant to those principles, clearly, manifestly and constitutionally expressed, must have the force of law.” *Opinion of Justices*, 7 Mass. 524, 525.

Thus by weighing Coke's words, and comparing them with his own statements and later authorities, they are relieved from the misconstruction, which has occasioned modern commentators either, like Chancellor Kent, to praise a boldness which Coke never assumed, or, like Lord Campbell, to sneer at what they would not take the trouble to understand. 1 Kent Com. (6th ed.) 448. 2 Campbell's Lives of the Chancellors, 248, note. 1 Campbell's Lives of the Chief Justices, 290.

<sup>1</sup> *Day v. Savadge*, Hob. 87. The dispute there was upon the liability of a freeman of London to pay wharfage to the city, and the question was whether this should be tried by certificate of the mayor and aldermen according to the customs of London (which had been confirmed by Act of Parliament) or by a jury. The very paragraph which contains the *dictum* quoted in the text shows that there was another sufficient reason for ordering a trial by jury. That paragraph, which concludes the opinion, is thus: “By that that hath been said it appears, that though in pleading it were confessed that the custome of certificate of the customes of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customes intended, and because even an Act of Parliament, made against naturall equitie, as to make a man judge in his owne case, is void in it selfe, for *Jura naturæ sunt immutabilia*, and they are *leges legum*.”

Bracton, with more accuracy, wrote, “*Jura enim naturalia dicuntur immutabilia, quia non possunt ex toto abrogari vel auferri, poterit tamen eis derogari vel detrahi in specie vel in parte.*” Lib. 1, c. 5, § 8.

<sup>2</sup> *City of London v. Wood*, 12 Mod. 687. Approved by Wilde, J., in *Commonwealth v. Worcester*, 3 Pick. 472, and by Metcalf, J., in *Williams v. Robinson*, 6 Cush. 335, 336.

*Nemo debet esse judex in sua propria causa* has always been a fundamental maxim of



The law was laid down in the same way, on the authority of the above cases, in Bacon's Abridgment, first published in 1735; in Viner's Abridgment, published 1741-51, from which Otis quoted it; and in Comyn's Digest, published 1762-7, but written more than twenty years before. And there are older authorities to the same effect. So that at the time of Otis's argument his position appeared to be supported by some of the highest authorities in the English law.<sup>1</sup>

the common law. *Chancellor of Oxford's Case*, 8 H. 6, 18; Bro. Ab. Patent, 15. Lit. § 212. Co. Lit. 141 a. *Derby's Case*, 12 Rep. 114; 4 Inst. 213. 2 Rol. Ab. Judges, A. *Hesketh v. Braddock*, 3 Bur. 1858. *The Queen v. Justices of Hertfordshire*, 6 Q. B. 753. *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759. *Egerton v. Brownlow*, 4 H. L. Cas. 240. *Pearce v. Atwood*, 13 Mass. 340, 341. *Commonwealth v. McLane*, 4 Gray, 427. *Hush v. Sherman*, 2 Allen, 597. *Washington Ins. Co. v. Price*, Hopk. Ch. 1. *Peck v. Freeholders of Essex*, Spencer, 475; 1 Zab. 657. Governor Winthrop, when accused before the General Court of Massachusetts in 1645 for acts done by him as a magistrate, "coming in with the rest of the magistrates, placed himself beneath within the bar and so sat uncovered." 2 Winthrop's Hist. N. E. 224. And so did Lord Holt upon the trial in 1693 of a suit brought by the Crown to test his right as C. J. K. B. to appoint the chief clerk for enrolling pleas in that court. *Bridgman v. Holt*, Show. P. C. 111. Yet an interested judge may act if no other has jurisdiction of the matter. *Anon.* cited 8 H. 6, 19 b, and Bro. Ab. Judges, 6. *Great Charte v. Kennington*, 2 Stra. 1173; Bur. Set. Cas. 194. *The Queen v. Great Western Railway*, 13 Q. B. 327. *Ranger v. Great Western Railway*, 5 H. L. Cas. 88. *Commonwealth v. Ryan*, 5 Mass. 92. *Hill v. Wells*, 6 Pick. 109. *Commonwealth v. Emery*, 11 Cush. 411. *In re Leefe*, 2 Barb. Ch. 39. Or if he is expressly authorized by statute. *The King v. Justices of Essex*, 5 M. & S. 513. *Commonwealth v. Worcester*, 3 Pick. 472. *Commonwealth v. Reed*, 1 Gray, 474, 475. And an interested judge may do formal acts necessary to bring the case before the proper tribunal. *The King v. Yarpole*, 4 T. R. 71. *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 787. *Jeffries v. Sewall*, 2 John Adams's Works, 138, 139. *Richardson v. Boston*, 1 Curt. C. C. 251. *Buckingham v. Davis*, 9 Maryland, 329. *Heydenfeldt v. Towns*, 27 Alab. 430. But if a judge causes a suit in which he is interested to be brought before him, his judgment therein will be void, although he is sole judge of the court. *Mayor of Hereford's Case*, cited 7 Mod. 1; 2 Ld. Raym. 766; & 1 Salk. 201, 396. *Richardson v. Welcome*, 6 Cush. 332. Judge Rolle was of opinion that even consent of parties would not give jurisdiction to an interested judge, "because it is against natural reason." *Smith v. Hancock*, Style, 138. But it is now well settled that the objection of interest may be waived, unless it is made by constitution or statute an absolute disqualification. *Regina v. Cheltenham Commissioners*, 1 Q. B. 475. *Kent v. Charlestown*, 2 Gray, 281. *Tolland v. County Commissioners*, 13 Gray, 13. *Sigourney v. Sibley*, 21 Pick. 106. *Paddock v. Wells*, 2 Barb. Ch. 335. *Oakley v. Aspinwall*, 3 Comst. 547.

<sup>1</sup> Bac. Ab. Statutes, A. Vin. Ab. Statutes, E. 6 pl. 15; *ante*, 51. Com. Dig. Parliament, R. 27. Story's Miscellaneous Writings, 125-133. Doct. & Stud. lib. 1, cc. 2, 6. 1 Finch, c. 6. Noy's Max. 19. John Milton, in his Defence of the People of England, appealed to "that fundamental maxim in our law, by which nothing is to be counted a law, that is contrary to the law of God, or of reason." 6 Milton's Prose Works (ed. 1851), 204.

Even Sir William Blackstone in his Commentaries, first published in 1765, admitted "that the rule is generally laid down that Acts of Parliament contrary to reason are void;" adding, however, "but if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it." 1 Bl. Com. 91. And so the law was stated in the editions published during his life, the eighth and last of which was published in 1778. In the posthumous editions his statement is thus modified: "I know of no power in the ordinary forms of the Constitution, that is vested with authority to control it;" and the qualifying words appear in the corrections for the press made in his own handwriting in the margin of a copy of the eighth edition, now owned by Mr. Francis E. Parker of Boston. Perhaps the American Revolution

The same doctrine was repeatedly asserted by Otis,<sup>1</sup> and was a favorite in the Colonies before the Revolution.<sup>2</sup> There are later *dicta* of many eminent judges to the effect

forced itself more distinctly upon the notice of the learned commentator between 1776 and his death in 1780.

Opposite the statements of the power of the Parliament in 1 Bl. Com. 49, 97, 161, 189, Quincy in his copy wrote "Qu," and references to Vattel's Law of Nations, Bk. 1, c. 3, pp. 15-19, and Furneaux's Letter to Blackstone, 81, 83. And at Blackstone's statement, "It must be owned that Mr. Locke and other theoretical writers have held that 'there remains still inherent in the people a supreme power to remove or alter the legislature, when they find the legislative Act contrary to the trust reposed in them; for when such trust is abused, it is thereby forfeited, and devolves to those who gave it.' But *however just this conclusion may be in theory, we cannot adopt it, nor argue from it, under any dispensation of government at present actually existing.*" — 1 Bl. Com. 161, 162 — the words here printed in italics are underlined by Quincy, who adds in the margin, "*Tamen quere* whether a conclusion can be just in theory, that will not bear adoption in practice." This very passage affords another instance of Blackstone's careful revision of his work. In the sixth and subsequent editions the word "practically" is inserted before the word "adopt;" and for the words "argue from it" are substituted "take any legal steps for carrying it into execution."

<sup>1</sup> *Jeffries v. Sewall*, 2 John Adams's Works, 139. Rights of the British Colonies, 41, 61, 62, 71, 72, 73, 109, 110.

<sup>2</sup> In the controversy of Massachusetts with the other Confederated Colonies of New England in 1653 upon the right of the Confederation to make offensive war, all parties agreed that any acts or orders manifestly unjust or against the law of God were not binding. 10 Plym. Col. Rec. 215-223; 2 Hazard Hist. Coll. 270-283. In 1688 "the men of Massachusetts did much quote Lord Coke." Lambert MS. quoted in 2 Bancroft's Hist. U. S. 428. And in 1765, Hutchinson, speaking of the opposition to the Stamp Act, said, "The prevailing reason at this time is, that the Act of Parliament is against Magna Charta, and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void." "Summary of the Disorders in the Massachusetts Province proceeding from an Apprehension that the Act of Parliament called the Stamp Act deprives the People of their Natural Rights," 26 Mass. Archives, 180, 183. And see Hutchinson to Jackson, September 12, 1765, quoted *ante*, 441; Arguments of Adams and Otis on the Memorial of Boston to the Governor and Council, *ante*, 200, 201, 205, 206; 2 John Adams's Works, 158, 159, note. Even the judges appointed by the Royal Governor do not seem to have been prepared to deny this principle. John Cushing, one of the associate justices, in a letter to Chief Justice Hutchinson, dated "In a hurry, Feb. 7, 1766," upon the question whether the courts should be opened without stamps, wrote, "Its true It is said an Act of Parliament against natural Equity is void. It will be disputed whether this is such an Act. It seems to me the main Question here is whether an Act which cannot be carried into execution should stop the Course of Justice, and that the Judges are more confined than with respect to an obsolete Act. If we admit evidence unstamped *ex necessitate* Q. if it can be said we do wrong." 25 Mass. Archives, 55. And in 1776, after the Governor had left, and the Council and House of Representatives had assumed the government, John Adams, in answering a letter of congratulation upon his own appointment as Chief Justice of Massachusetts, from William Cushing, his senior associate, and who upon Adams's declination became Chief Justice in his stead, and afterwards a Justice of the Supreme Court of the United States, wrote, "You have my hearty concurrence in telling the jury the nullity of Acts of Parliament." 9 John Adams's Works, 390, 391, & note.

In a case before the General Court of Virginia in 1772, George Mason, as reported by Thomas Jefferson, argued that the provision of the statute of that Colony of 1682, that "all Indians which shall hereafter be sold by our neighboring Indians, or any other trafficking with us as for slaves, are hereby adjudged, deemed and taken to be slaves," was "originally void, because contrary to natural right and justice," citing Coke and Hobart, *ubi sup.* The only authority cited on the other side was 1 Bl. Com.

that a statute may be void as exceeding the just limits of legislative power;<sup>1</sup> but it is believed there is no instance, except one case in South Carolina,<sup>2</sup> in which an Act of the Legislature has been set aside by the courts, except for conflict with some written constitutional provision.<sup>3</sup>

The reduction of the fundamental principles of government in the American States to the form of written constitutions, established by the people themselves, and beyond the control of their representatives, necessarily obliged the judicial department, in case of a conflict between a constitutional provision and a legislative act, to obey the Constitution as the fundamental law and disregard the statute. This duty was recognized, and unconstitutional acts set aside, by courts of justice, even before the adoption of the

91. As the court held that the Act of 1682 had been repealed by a subsequent statute, it became unnecessary to decide the question. 2 Henning's Sts. at Large, 491. *Robin v. Hardaway*, Jefferson R. 114, 118, 123. And in the debates on the adoption of the Constitution of the United States, Patrick Henry said that the Virginia judges had opposed unconstitutional Acts of the Legislature. 4 Elliott's Deb. (2d ed.) 325. *Et vid. sup.* 519, note.

<sup>1</sup> Ellsworth, in 3 Madison Deb. 1400; 5 Elliot's Debates, 462. Chase, J. in *Calder v. Bull*, 3 Dall. 388. Marshall, C. J. and Johnson, J. in *Fletcher v. Peck*, 6 Cranch, 135, 136, 143. Thompson, J. in *Ogden v. Saunders*, 12 Wheat. 304. Story, J. in *Wilkinson v. Leland*, 2 Pet. 657, 658. *Ham v. M'Claus*, 1 Bay, 95. 5 Dane Ab. 248. Parker, C. J. in *Foster v. Essex Bank*, 16 Mass. 270, 271, and *Ross's Case*, 2 Pick. 169. Richardson, C. J. in *Opinion of Justices*, 4 N. H. 566. Prentiss, J. in *Lyman v. Mower*, 2 Verm. 519. Redfield, C. J. in *Hatch v. Vermont Central Railroad*, 25 Verm. 66. Hosmer, C. J. in *Goshen v. Stonington*, 4 Conn. 225. Spencer, C. J. in *Bradshaw v. Rogers*, 20 Johns. 106. Walworth, C. in *Varick v. Smith*, 5 Paige, 159, and *Cochran v. Van Surlay*, 20 Wend. 373. Bronson, C. J. in *Taylor v. Porter*, 4 Hill, 144, 145. Jewett, J. in *Powers v. Bergen*, 2 Selden, 367. Bland, C. in *Campbell's Case*, 2 Bland, 231, 232.

<sup>2</sup> In 1792 the Superior Court of South Carolina held that an Act passed by the legislature of the Colony in 1712, which took away the freehold of one man and vested it in another, was "against common right, as well as against Magna Charta," and "therefore *ipso facto* void." *Bowman v. Middleton*, 1 Bay, 252. [This case is, in truth, no exception. It is to be noticed that the decision pronounces the Act invalid as of 1712, when it was passed. At that time the authority of Parliament, and so of the statute of Magna Charta, was paramount in South Carolina. The terms of the decision are as follows: "The court (present, GRIMKE and BAY, Justices), who [*sic*], after a full consideration on the subject, were clearly of opinion, that the plaintiffs could claim no title under the Act in question, as it was against common right, as well as against Magna Charta, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question. That the Act was, therefore, *ipso facto*, void. That no length of time could give it validity, being originally founded on erroneous principles. That the parties, however, might, if they chose, rely upon a possessory right, if they could establish it." It may be added that at the time of this decision the Constitution of the State expressly affirmed the principle of "common right," which is here in question. — ED.]

<sup>3</sup> It was said by Chief Justice Parsons, and repeated by Chief Justice Shaw, that "the legislature may make all laws not repugnant to the Constitution." *Stoughton v. Baker*, 4 Mass. 529. *Commonwealth v. Alger*, 7 Cush. 101. And see *Opinion of Justices*, 7 Mass. 525; Patterson, J. in *Vanhorne v. Dorrance*, 3 Dall. 308; Iredell, J. in *Calder v. Bull*, 3 Dall. 398, 399; Washington, J. in *Beach v. Woodhull*, Pet. C. C. 6; Baldwin, J. in *Bennett v. Boggs*, Bald. 74; 1 Kent Com. 448; Verplanck, Senator, in *Cochran v. Van Surlay*, 20 Wend. 382; Bronson, J. in *People v. Fisher*, 24 Wend. 220; Cowen, J. in *Butler v. Palmer*, 1 Hill N. Y. 329, 330; Gibson, C. J. in *Harvey v. Thomas*, 10 Watts, 66, 67; Rogers, J. in *Commonwealth v. M'Closkey*, 2 Rawle, 374; Huston, J. in *Braddee v. Brownfield*, 2 W. & S. 285.

Constitution of the United States.<sup>1</sup> Since the ratification of that Constitution the power of the courts to declare unconstitutional statutes void has become too well settled to require an accumulation of authorities.<sup>2</sup> But as the office of the judiciary is to decide particular cases, and not to issue general edicts, only so much of a statute is to be declared void as is repugnant to the Constitution and covers the case before the court, unless the constitutional and unconstitutional provisions are so interwoven as to convince the court that the legislature would not have passed the one without the other.<sup>3</sup>

THERE will be found, in the Appendix to Part I. (*infra*, p. 381), the text of the Constitution of the United States and its amendments, and that of Massachusetts, without its amendments. Such passages, also, are there given from all the other State constitutions which preceded that of the United States, and from the colonial charters of Connecticut and Rhode Island, as are likely to be instructive for the purposes of this book. There are added, as indicating the conceptions which find expression in the more recent instruments, those parts of a typical modern constitution — that of Colorado, adopted in 1876, “the year of the Independence of the United States, the one hundredth” — which are most characteristic. The relative length of the older and the later instruments may be seen by comparing the original Constitution of Massachusetts, which fills a little over sixteen pages of Poore’s Charters and Constitutions, with that of Colorado, which covers a little more than twenty-nine pages.

Finally the Appendix has certain interesting parts of an American Constitution outside the United States, *viz.*, that of Colombia.

The Constitution of Massachusetts has a peculiar interest, not only as being the original Constitution of the State, and the oldest of all American instruments now in force, but also as being the first anywhere submitted to a popular vote and approved by the people.<sup>4</sup>

<sup>1</sup> The very few reports which have been preserved of the judicial decisions of that period afford two such examples. In 1786 the judges of the Superior Court of the State of Rhode Island refused to act under a statute of the General Assembly, which provided for the trial of an offence upon information before the judges without a jury, contrary to the Constitution of the State as embodied in the Royal Charter of Charles 2. *Trevett v. Weeden*, reported by James M. Varnum, Providence, 1787; 2 Chandler’s Crim. Trials, 279 & seq. And in 1787 the judges of the Superior Court of North Carolina set aside an Act of that State, which deprived a citizen of his property without trial by jury, in violation of the State Constitution of 1776. *Den v. Singleton*, Martin N. C. 49.

<sup>2</sup> Federalist, No. 78. *Vanhorne v. Dorrance*, 2 Dall. 308. *Cooper v. Telfair*, 4 Dall. 19. *Marbury v. Madison*, 1 Cranch, 177–180. 1 Wilson’s Works, 461, 462. 3 Story on Const. U. S. §§ 1570, 1608. 1 Kent Com. 449–454.

<sup>3</sup> *Bank of Hamilton v. Dudley*, 2 Pet. 526. *Commonwealth v. Knox*, 6 Mass. 77. *Wellington, petitioner*, 16 Pick. 95–97. *Commonwealth v. Kimball*, 24 Pick. 361. *Norris v. Boston*, 4 Met. 288. *Fisher v. McGirr*, 1 Gray, 21. *Warren v. Mayor & Aldermen of Charlestown*, 2 Gray, 98, 99. *Jones v. Robbins*, 8 Gray, 338, 339.

<sup>4</sup> John Adams wrote, while this instrument was in preparation: “There never was an example of such precautions as are taken by this wise and jealous people in the formation of their government. None was ever made so perfectly upon the principle of the people’s rights and equality. It is Locke, Sidney, and Rousseau and De Mably reduced to practice, in the first instance.”— 4 *Works of John Adams*, 216. Adams was

Omitting Connecticut and Rhode Island, which lived under their colonial charters until 1818 and 1842 respectively, Massachusetts was the last of the original States in actually adopting a written constitution. Ten, and, if Vermont be counted, eleven constitutions had previously gone into operation; but none of them had been submitted to the popular vote. The Massachusetts Legislature, in 1778, had submitted the draft of a constitution to the people, but it was rejected. So, also, in 1779, in New Hampshire, a proposed second constitution was submitted to the people and rejected. The facts relating to all the States will be found carefully gathered in Jameson, *Constitutional Conventions* (4th ed. 1887), ss. 126-157, and in the *Table*, *Ib.* 643. See also the notes, under the various instruments, in Poore's *Charters and Constitutions*.

Of this reference to the popular vote, sometimes called "the constituting referendum," and by the French the "*plébiscite constituant*," it has been said by a recent writer:<sup>1</sup> "*L'organisation de l'exercice du pouvoir constituant, telle que la consacrent actuellement les législations américaines, appartient tout entière à la Nouvelle-Angleterre. Elle est basée, non seulement sur le principe que l'autorité constituante appartient au peuple, mais encore sur cette autre conception, ramenée dans le droit moderne par la Réforme puritaine, que cette autorité ne peut être représentée.*"

# COMMONWEALTH v. CATON ET AL.

COURT OF APPEALS OF VIRGINIA. 1782.

[4 *Call*, 5.]

THIS case came before the court<sup>2</sup> by adjournment from the General Court, and was as follows:

John Caton, Joshua Hopkins, and John Lamb were condemned for treason, by the General Court, under the Act of Assembly concerning that offence, passed in 1776, which takes from the executive the power of granting pardon in such cases.<sup>3</sup> The House of Delegates by

a member of the convention which framed the Constitution, and had a leading part in preparing it. "I had the honor," he wrote, in 1780, "to be the principal engineer." *Works, ubi supra.*—ED.

<sup>1</sup> *L'Établissement et la Révision des Constitutions aux États-Unis d'Amérique*, by Charles Borgeaud; *Annales de l'École Libre des Sciences Politiques* (1893).

<sup>2</sup> Which at that time consisted of the judges of the High Court of Chancery; those of the General Court; and those of the Admiralty assembled together. *Ch. Rev.* 102, And the sitting members, upon the present occasion, were EDMUND PENDLETON. GEORGE WYTHE, and JOHN BLAIR, judges of the High Court of Chancery; PAUL CARRINGTON, BARTHOLOMEW DANDRIDGE, PETER LYONS, and JAMES MERCER, judges of the General Court; and RICHARD CARY, one of the judges of the Court of Admiralty.

<sup>3</sup> The words of the Act are, "The Governor, or in case of his death, inability, or necessary absence, the councillor who acts as president, shall in no wise have or exer-

resolution of the 18th of June, 1782, granted them a pardon, and sent it to the Senate for concurrence; which they refused. The men, however, were not executed, but continued in jail under the sentence; and, in October, 1782, the Attorney-General moved in the General Court, that execution of the judgment might be awarded. The prisoners pleaded the pardon granted by the House of Delegates. The Attorney-General denied the validity of the pardon, as the Senate had not concurred in it: and the General Court adjourned the case, for novelty and difficulty, to the Court of Appeals.

The resolution of the House of Delegates was in the following words:

“IN THE HOUSE OF DELEGATES,

“Tuesday the 18th of June, 1782.

“Resolved that James Lamb, Joshua Hopkins, and John Caton, who stand convicted and attainted of treason by judgment of the General Court, at their last session, and appear to be proper objects of mercy, be and are hereby declared to be pardoned for the said treason, and exempted from all pains and penalties for the same; provided they and each of them repair to the county of Augusta within — days from this time, and continue within the said county during their natural lives respectively. Ordered that Mr. Patrick Henry do carry the said resolution to the Senate and desire their concurrence.”

The cause was argued in the Court of Appeals by *Mr. Randolph*, the Attorney-General, for the Commonwealth, and by *Mr. Hardy* and several other distinguished gentlemen for the prisoners.

For the Commonwealth it was contended, that the pardon was void, as the Senate had not concurred. That the clause in the Constitution might be read two ways, either of which would destroy the pardon. One was, to throw the words, “or the law shall otherwise particularly direct,” into a parenthesis; which would confine the separate power of the Lower House to cases of impeachment only; and would leave those where the assembly had taken it from the executive to the direction of the laws made for the purpose. The other was, to take the whole sentence as it stands, and then the construction will, according to the obvious meaning of the Constitution, be that, although the House of Delegates must originate the resolution, the Senate must in all cases concur, or it will have no effect. For it would be absurd to suppose, that the same instrument which required the whole legislature to make a law, should authorize one branch to repeal it.

For the prisoners, it was contended, that the language of the Constitution embraced both sets of cases, as well those of impeachment, as those where the assembly should take the power of pardoning from the executive: and, in both, that the direction was express that the

cise a right of granting pardon to any person or persons convicted in manner aforesaid, but may suspend the execution until the meeting of the General Assembly, who shall determine whether such person or persons are proper objects of mercy or not, and order accordingly.” — *Ch. Rev.* 40.

power of pardoning belonged to the House of Delegates. That the words of the Constitution, and not conjectures drawn from the supposed meaning of the framers of it, should give the rule. That the Act of Assembly was contrary to the plain declaration of the Constitution; and therefore void. That the prisoners were misguided and unfortunate men; and that the construction ought, in favor of life, to incline to the side of mercy.

The Attorney-General, in reply, insisted, that compassion for the prisoners could not enter into the case; and that the Act of Assembly pursued the spirit of the Constitution. But that, whether it did or not, the court were not authorized to declare it void. *Cur. adv. vult.*

WYTHE, J. Among all the advantages which have arisen to mankind from the study of letters, and the universal diffusion of knowledge, there is none of more importance than the tendency they have had to produce discussions upon the respective rights of the sovereign and the subject; and upon the powers which the different branches of government may exercise. For, by this means, tyranny has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty promoted. But this beneficial result attains to higher perfection, when those who hold the purse and the sword, differing as to the powers which each may exercise, the tribunals, who hold neither, are called upon to declare the law impartially between them. For thus the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established. Under these impressions, I approach the question which has been submitted to us; and although it was said the other day, by one of the judges, that, imitating that great and good man Lord Hale, he would sooner quit the Bench than determine it, I feel no alarm; but will meet the crisis as I ought; and, in the language of my oath of office, will decide it, according to the best of my skill and judgment.

I have heard of an English Chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject against the encroachments of the Crown, and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine, to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other; and, whenever the proper occasion occurs, I shall feel the duty, and fearlessly perform it. Whenever traitors shall be fairly convicted, by the verdict of their peers, before the competent tribunal, if one branch of the legislature, without the concurrence of the other, shall attempt to rescue the offenders from the sentence of the law, I shall not hesitate, sitting in this place, to say to the General Court, *Fiat justitia, ruat cælum*; and, to the usurping branch of the legislature, you attempt worse than a vain thing; for although you cannot succeed, you set an example which may

convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the Constitution, will say to them, here is the limit of your authority, and hither shall you go, but no further.

Waiving, however, longer discussion upon those subjects, and proceeding to the question immediately before us, the case presented is, that three men, convicted of treason against the State, and condemned by the General Court, have pleaded a pardon, by the House of Delegates, upon which that House insists, although the Senate refuses to concur; and the opinion of the court is asked, whether the General Court should award execution of the judgment, contrary to the allegation of the prisoners, that the House of Delegates alone have the power to pardon them, under that article of the Constitution which says, "But he (the Governor) shall, with the advice of the Council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the law shall otherwise particularly direct; in which cases, no reprieve or pardon shall be granted, but by resolve of the House of Delegates."

Two questions are made,

1. Whether this court has jurisdiction in the case?
2. Whether the pardon is valid?

The first appears, to me, to admit of no doubt; for the Act constituting this court is express, that the court shall have jurisdiction "In such cases as shall be removed before them, by adjournment from the other courts before mentioned, when questions, in their opinion new and difficult, occur." *Chan. Rev.* 102: which emphatically embraces the case under consideration.

The sole inquiry therefore is, whether the pardon be valid?

If we consider the genius of our institutions, it is clear that the pretensions of the House of Delegates cannot be sustained. For, throughout the whole structure of the government, concurrence of the several branches of each department is required to give effect to its operations. Thus the Governor, with the advice of the Council of State, may grant pardons, commission officers, and embody the militia; but he can do neither without the assent of the council: the two branches of the legislature may pass laws, but a bill passed by one of them has no force: and the two houses of assembly may elect a judge; but an appointment, by one of them only, would be useless. This general requisition of union seems of itself to indicate that nothing was intended to be done, in any department, without it; and, accordingly, the fourth section of the Constitution declares, that "The legislature shall be formed of two distinct branches, who, *together*, shall be a complete legislature;" and the eighth, "that all laws shall originate in the House of Delegates, to be approved or rejected by the Senate." Thus requiring, in conformity to the regulations throughout the whole fabric



of government, an union of the two branches, to constitute a legislature; and an union of sentiment in the united body, to give effect to their acts. And it is not to be believed, that, when this union was so steadfastly demanded, even in the smallest cases, it was meant to be dispensed with, in one of the first magnitude, and which might involve the vital interests of the community.

But if we advert to the motive for the regulation, the necessity for concurrence will be more apparent. For it is obvious, that the contests in England between the House of Commons and the Crown, relative to impeachments, gave rise to it, as the king generally pardoned the offender, and frustrated the prosecution. With this in view, the power of pardoning cases of that kind was taken from the executive here, and committed to other hands, in order that the evil complained of there might be removed. But the interpretation contended for by the House of Delegates, in effect, reverses the object. Thus the object was to put a check to prerogative in one department; the effect is to remove all check, and establish prerogative in another department. The object was to prevent disappointment, by one department, of the national will; the effect is to enable less than a department to defeat it. . . .

These arguments receive some illustration from the twentieth section of the Constitution, recognizing the power of the whole legislature, and not one branch, to abolish penalties and forfeitures: which is contravened by the other construction; for, if the House of Delegates can remit part of the penalty, they may the whole, as well the forfeiture of the goods, as the corporal suffering. An idea utterly inconsistent with the recognition of a power, in the whole legislature, to do it.

Every view of the subject, therefore, repels the construction of the House of Delegates; and, accordingly, the practice is said to have been against it, ever since the formation of the government: which seems to have been the understanding upon the present occasion; for the resolution provides that it shall be sent to the Senate for concurrence.

This mode of considering the subject obviates the objection made by the prisoners' counsel, relative to the constitutionality of the law concerning treason; for, according to the interpretation just discussed, there is nothing unconstitutional in it.

I am, therefore, of opinion, that the pardon pleaded by the prisoners is not valid; and that it ought to be so certified to the General Court.

PENDLETON, President. . . . The question, upon the merits, is whether by the paper stated in the record as the resolution of the House of Delegates, these three unhappy men stand pardoned of the treason of which they are attainted in the General Court, or still remain subject to the execution of the judgment which passed against them upon their conviction? If the exclusive power of the House of Delegates on this occasion was to be admitted, it would be difficult to maintain that this resolution should operate as a pardon, since those who made it, by sending it to the Senate for their con-

currence, appear to have suspended its operation until the concurrence of the Senate should be obtained, which not having happened, the force of it stands as yet suspended; or rather the Senate, by rejecting this, and the House of Delegates not passing another, their power remains unexercised, and the attainder retains its full force. But, as I do not make this the ground of my judgment, I shall pass to the two great points into which the question has been divided, whether, if the constitution of government and the Act declaring what shall be treason are at variance on this subject, which shall prevail and be the rule of judgment? And then, whether they do contravene each other? The constitution of other governments, in Europe or elsewhere, seem to throw little light upon this question, since we have a written record of that which the citizens of this State have adopted as their social compact; and beyond which we need not extend our researches. It has been very properly said, on all sides, that this Act, declaring the rights of the citizens, and forming their government, divided it into three great branches, the legislative, executive, and judiciary, assigning to each its proper powers, and directing that each shall be kept separate and distinct, must be considered as a rule obligatory upon every department, not to be departed from on any occasion. But how far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important, and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas. I am happy in being of opinion there is no occasion to consider it upon this occasion; and still more happy in the hope that the wisdom and prudence of the legislature will prevent the disagreeable necessity of ever deciding it, by suggesting the propriety of making the principles of the Constitution the great rule to direct the spirit of their laws.

It was argued by the counsel for the prisoners, that the interpretation, now to be made, ought, in favor of life, to incline to the side of mercy, and that compassion for the misguided and unfortunate ought to have some influence on our decision.

Mercy—divine attribute! Often necessary to the best, sometimes due to the worst, and from the infirmities of our nature always to be regarded, when circumstances will admit of it. But how, in public concerns, this is to be accomplished with just attention to the general welfare, has, in every age, been a *desideratum* with statesmen and legislators. For, in human associations, other considerations, as well as the dictates of mercy, must be attended to. Compassion for the individual must frequently yield to the safety of the community. Society proceeds upon that principle. Men surrender part of their natural rights to insure protection for the residue against domestic violence, and hostilities from abroad; which can only be effected by the due

execution of wholesome laws calculated to maintain the rights of private citizens, and the integrity of the State. But how would this be promoted by letting loose, notorious offenders to burn, to rob, and to murder, or to aid a foreign foe in his unjust attempts upon the liberties of the country? Mercy, in such cases, to one, would be cruelty to the rest.

Aware of this, the makers of the Constitution, considering that although, in representative governments, the laws should be mild, they ought to be rigidly executed; and that, although a power to pardon, which had often been abused in England, should exist somewhere, it ought never to be exercised without proper cause, framed the clause now under consideration; which provides that the Governor, or Chief Magistrate, "shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom of England; but he shall, with the advice of the Council of State, have the power of granting reprieves and pardons:" not in all cases indiscriminately, but in such only as were least liable to abuse; the rest were confided to agents less exposed to temptation.

Thus the power was, in general, committed to the executive: but as to cases concerning the conduct of public officers, and those which policy might suggest to the legislature as proper to be taken from the Chief Magistrate and his council, it was thought a safer depository, beyond the reach of the various passions and motives which might influence a few individuals, would be found in the General Assembly; and therefore the clause excepts cases of impeachment, and those which the law might otherwise provide for. In these, the power of pardoning is reserved to the representatives of the people: but whether to one or both Houses is the important question. A question which should be decided according to the spirit, and not by the words of the Constitution.

The language of the clause is inaccurate, and admits of both the constructions mentioned by the Attorney-General, that is to say, 1. By throwing the words, "or the law shall otherwise particularly direct," into a parenthesis, to confine the power of pardoning, by resolution of the House of Delegates alone, to cases of impeachment only; and to leave those which the General Assembly might take from the executive, to the direction of the laws made for the purpose. 2. By taking the clause altogether, to make the representatives of the people the source of mercy, provided the consent of the Senate was obtained. Either view of the subject satisfies the present inquiry; but I prefer the first, as most congenial to the spirit, and not inconsistent with the letter, of the Constitution.

The treason law appears to have been framed upon this idea; and, in passing it, the legislature have, in my opinion, pursued, and not violated, the Constitution. Indeed, the House of Delegates appear to have understood it so themselves, as they sent the resolution to the

Senate for their concurrence, which not having been obtained, the resolution is of no force, and the pardon falls to the ground.

CHANCELLOR BLAIR and the rest of the judges were of opinion, that the court had power to declare any resolution or Act of the Legislature, or of either branch of it, to be unconstitutional and void; and that the resolution of the House of Delegates, in this case, was inoperative, as the Senate had not concurred in it. That this would be the consequence clearly if the words, "or the law shall otherwise particularly direct," were read in a parenthesis; for then the power of pardoning by the House of Delegates would be expressly confined to cases of impeachment by that House; and, if read without the parenthesis, then the only difference would be, that the assent of the two Houses would be necessary; for it would be absurd to suppose that it was intended by the Constitution that the Act of the whole Legislature should be repealed by the resolution of one branch of it, against the consent of the other.

The certificate to the General Court was as follows:—

"The court proceeded, pursuant to an order of the court of Thursday last, to render their judgment on the adjourned question, from the General Court, in the case of John Caton, Joshua Hopkins, and James Lamb; whereupon it is ordered to be certified, to the said General Court, as the opinion of this court, that the pardon, by resolution of the House of Delegates, severally pleaded and produced in the said court, by the said John Caton, Joshua Hopkins, and James Lamb, as by the record of their case appears, is invalid."

N. B. — It is said, that this was the first case in the United States, where the question relative to the *nullity* of an unconstitutional law was ever discussed before a judicial tribunal: and the firmness of the judges (particularly of Mr. WYTHE) was highly honorable to them, and will always be applauded, as having incidentally fixed a precedent, whereon a general practice, which the people of this country think essential to their rights and liberty, has been established.<sup>1</sup>

<sup>1</sup> For an account of the earliest constitutional cases in the States see a valuable article in 19 Am. Law Rev. 175 (1885), by William M. Meigs, Esq., of the Philadelphia Bar. The earliest judicial decision of the point that judges may disregard legislative Acts at variance with the Constitution, appears to have been given in *Holmes v. Walton*, in New Jersey in 1780, — an unreported case, cited in 4 Halstead, 444. The exact date was determined by Professor Scott, of Rutgers College, a few years ago; see 2 Am. Hist. Assoc. Papers, 45 (1886). As to a dubious unreported Virginia case of 1778, see 19 Am. Law Rev. 178. Of reported cases the earliest are given in this book. In Coxe's Jud. Power and Unconst. Legis. 219–271, there is a valuable consideration of the early precedents in the States. — Ed.

RUTGERS v. WADDINGTON.<sup>1</sup>

MAYOR'S COURT, CITY OF NEW YORK. August 27, 1784.

THIS was an action of trespass brought against the defendant, upon an Act of the Legislature of this State, passed the seventeenth of March, one thousand seven hundred and eighty-three, for the occupation of a brew-house and malt-house of the plaintiff, from the thirteenth day of August, one thousand seven hundred and seventy-eight, until the time of passing the Act above mentioned. The cause came on to be argued upon demurrer, before the HONORABLE JAMES DUANE, Esq., Mayor, RICHARD VARRICK, Esq., Recorder, BENJAMIN BLAGGE, WILLIAM W. GILBERT, WILLIAM NEILSON, THOMAS RANDAL, and THOMAS IVERS, Esquires, aldermen, on Tuesday, the twenty-ninth day of June past.

The counsel for the plaintiff were *Mr. Lawrence*, assisted by the *Attorney-General*, *Mr. Wilcox*, and *Mr. Troupe*. Those for the defendant were *Mr. Hamilton*, assisted by *Mr. B. Livingston*, and *Mr. Lewis*.

*Mr. Lawrence* opened the pleadings and arguments on the part of the plaintiff, and was followed by *Mr. Wilcox*. *Mr. Livingston*, *Mr. Lewis*, and *Mr. Hamilton*, were next successively heard, in behalf of the defendant, and were replied to by *Mr. Lawrence*, *Mr. Troupe*, and the *Attorney-General*. The arguments on both sides were elaborate, and the authorities numerous.

The court took time to advise, until Tuesday, the twenty-seventh day of August, and then the Honorable the Mayor proceeded to deliver the judgment of the court, as follows:—

In the case of *Elizabeth Rutgers* versus *Joshua Waddington*, which we gave notice should be determined this day, the court now proceed to judgment. It is represented to be a controversy of high importance; from the value of the property, which in this and other actions depends on the same principles; from involving in it questions which must affect the national character:—questions whose decision will record the spirit of our courts to posterity! Questions which embrace the whole law of nations!

It were to be wished, that a cause of this magnitude was not to receive its first impression from a court of such a limited jurisdiction, as that in which we preside;—from magistrates actively engaged in establishing the police of a disordered city, and in other duties, which cut them off from those studious researches which great and intricate questions require. If we err in our opinion, it will be a consolation, that it has been intimated, “to be probable, whatever may be the determination that it will not end here.”

<sup>1</sup> Pamphlet, New York. Printed by Samuel Loudon. 1784. Edited, with an Historical Introduction, by Henry B. Dawson. Morrisania, N. Y. 1866.

The counsel on both sides, who have managed this cause, and by whose diligence and abilities, so much learning, on an uncommon subject, hath been drawn into view, have spared us much labor.

We cannot but express the pleasure which we have received, in seeing young gentlemen, just called to the Bar, from the active and honorable scenes of a military life, already so distinguished as public speakers, so much improved in an arduous science.

That in a contest (which we are told) is not considered without temporary prepossession, we may express our sentiments with more deliberation and correctness; and that nothing to be offered by us, may be misunderstood or misapplied, we have taken the trouble to preserve our remarks by committing them to paper.

The action is grounded on a statute of this State, entitled, "an Act for granting a more effectual relief in cases of certain trespasses," passed the seventeenth day of March, one thousand seven hundred and eighty-three; and the declaration charges, 1st, the substance of the Act, *viz.*, "That it shall and may be lawful for any person or persons, who are, or were inhabitants of this State, and who, by reason of the invasion of the enemy, left his, her, or their place or places of abode, who have not voluntarily put themselves respectively into the power of the enemy, since they respectively left their places of abode, his, her, or their heirs, executors, or administrators, to bring an action of trespass against any person or persons, who may have occupied, injured, or destroyed his, her, or their estate, either real or personal, within the power of the enemy."

2. Complains that the defendant, on the thirtieth day of August, 1778, with force and arms, &c., occupied one brew-house, and one malt-house of the plaintiff, situate in the east ward of the city of New York, and within the jurisdiction of this court, and his occupation thereof so continued, from the said 13th day of August, in the year 1778, until the 17th day of March, in the year 1783.

3. And also, that he the said Joshua, with force and arms, &c., afterwards, to wit, the same 13th day of August, 1778, and at divers days and times, between the said 13th day of August, 1778, and the 17th day of March, 1783, occupied one other brew-house, and one other malt-house, of her the said Elizabeth, within the city and ward, and within the jurisdiction, &c., *et alia enormia*, to the great damage, &c., against the peace, &c. And the said Elizabeth avers, —

1st. That there was open war between the King of Great Britain, his vassals, &c., and the people of the State of New York aforesaid, on the 10th day of September, 1776, to wit, at the east ward, &c., and within, &c., and that the said open war continued from the said day until the time of passing the Act aforesaid.

2d. That the King of Great Britain, his vassals, &c., and the enemy mentioned and intended in the said Act are one and the same and not different.

3d. That she was an inhabitant of the State of New York, and

that the place of her abode was the city of New York, in the State of New York, on the tenth day of September, in the year last aforesaid, to wit, in the east ward, &c., and within the jurisdiction, &c.

4th. That by reason of the invasion of the enemy, she the said Elizabeth afterwards, to wit, the said tenth day of September, in the year aforesaid, left her said place of abode, to wit, in the ward aforesaid and within, &c.

5th. That she did not, at any time after she left her said place of abode, as aforesaid, voluntarily put herself within the power of the enemy aforesaid.

6th. That the brew-house and malt-house aforesaid were parcel of the real estate of the said Elizabeth, and at the days and times they were occupied by the said Joshua were in the power of the enemy, to wit, at the east ward, &c., and within, &c.

Wherefore the said Elizabeth saith she is made worse, and hath sustained damage to eight thousand pounds *et inde*, &c.

The defendant to this charge, as to the force and arms and whatsoever is against the peace, and as to the whole of the trespass aforesaid, except as to the occupying the said brew-house and malt-house of the said Elizabeth, on the twenty-eighth day of September, 1778, and continuing the occupation thereof until the seventeenth day of March, 1783, he pleads not guilty and takes issue.

And as to the occupying the brew-house and malt-house, on the aforesaid twenty-eighth day of September, 1778, and continuing the occupation thereof until the last day of April, 1780, inclusively, the said defendant saith, that the said Elizabeth *actionem non, quia dicit*, that long before the said twenty-seventh day of September, 1778, to wit, on the fourth day of July, 1776, in (substance) the Declaration of Independence by Congress [*sic*], who did then and there declare, that the United Colonies were, and of right ought to be free and independent States; that they were absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain was, and ought to be totally dissolved, &c. That the said declaration was on the ninth of July, in the year aforesaid, approved of by the Convention of the State of New York: and afterwards, on the 8th day of May, 1777, the same was recognized and confirmed by the legislature of this State.

That upon the 10th day of September, 1776, and from that time until after the last day of April, 1783, there being open war between, &c., the army of the said king, on the 10th day of September, 1776, conquered the city of New York, and continued in uninterrupted possession thereof, from that time until and after the last day of April, 1778; and the said army so being in possession, the said brew-house and malt-house, by virtue of authority from the commander-in-chief of the said army, on the 10th day of June, 1778, was taken possession of by the commissary-general of the said army, for the use of the said army — as by the laws, &c., of nations in time of war he lawfully

might do — and that the said commissary on, &c., at, &c., gave his license and permission to Benjamin Waddington and Evelyn Pierrepont, residing in the said city as British merchants, under the protection of the said British army, and having been from their birth and still being subjects of the King of Great Britain, to enter into, use, and occupy the said malt-house and brew-house, from the said 28th day of September, 1778, inclusively, to the last day of April, 1780, inclusively: by virtue whereof they entered and occupied the premises, from the first of the two last-mentioned days to the last inclusively; and the defendant as their servant and at their command, from time to time, and at divers times from the first to the last of those days, entered into and occupied the said brew-house and malt-house, for the benefit of the said Benjamin and Evelyn: *Quæ est eadem*, &c. whereof the plaintiff complains, in the first count of her declaration.

And as to the occupying the said brew-house and malt-house, from the last day of April, 1780, to the 17th of March, 1783, he pleads over again the Declaration of Independence of these States; the approbation thereof by the Constitution of the State; and the recognition and confirmation thereof by the Convention; the conquest of the city of New York by the British; and that the brew-house and malt-house being out of the possession of the plaintiff, the commander-in-chief of the said army, on the last day of April, 1780, gave his license and permission (as by the laws of nations he might lawfully do) to the said Benjamin and Evelyn (describing them as in the other plea) to enter into and occupy the said brew-house and malt-house, from the last day of April, 1780, until the said license and permission should be revoked; paying therefore to such person as the commander-in-chief should authorize to receive the same, at the rate of one hundred and fifty pounds for each year, in quarterly payments, &c.

He then avers that they accordingly entered and occupied the said brew-house and malt-house, on the 1st day of May, 1780, and continued the occupation thereof until the 17th day of March, 1783, till when the said license remained in force; and then avers as before, that he as their servant, and at their command, from time to time and at divers times, between the two last-mentioned days, did enter and occupy the said brew-house and malt-house, &c., *quæ est eadem*, &c., concluding with an averment, that the said Benjamin and Evelyn did pay the said one hundred and fifty pounds a year to John Smith, appointed by the said commander-in-chief to receive the same.

For further plea to the whole of the trespass, according to the form of the statute, the defendant saith, that the plaintiff *actionem non*, &c. Because he saith, that after the passing the Act of the Legislature of this State, in the declaration mentioned, to wit, on the 3d day of September, 1783, at, &c., a certain definitive treaty of peace, between the King of Great Britain and his subjects, and the United States and the subjects and citizens thereof and of each of them, was entered into, made and concluded by plenipotentiaries on the part of the said



king and States respectively (naming them) in virtue of full powers, &c., which definitive treaty, on the 14th day of January, 1784, at Annapolis, &c., by the United States of America in Congress, then and there assembled in due form, was ratified and confirmed; and afterwards on the same day, announced and published by proclamation under the seal of the United States, to all the good citizens of the said United States; enjoining all magistracies, legislatures, &c. to carry into effect the said definitive treaty, &c., *prout*, &c. In virtue of which said definitive treaty, all right, claim, &c., which either of the said contracting parties, and the subjects and citizens of either of them might otherwise have had to any compensation, recompense, retribution, or indemnity whatsoever, for or by reason of any injury, or damage, whether to the public or individuals, which either of the said contracting parties, and the subjects and citizens of either might have done or caused to be done to the other, in consequence of, or in anywise relating to the war between them, from the time of the commencement to the determination thereof, were mutually and reciprocally, virtually and effectually, relinquished, renounced, and released to each other, &c. — And he avers, as in his other plea, that from the time of his birth, and at all times since, he hath been and still is a subject of the King of Great Britain: and between the times in his plea mentioned, as a subject of the said king, resided in the city of New York, using the art, trade, &c., of a merchant, under the protection of the army of the said king, then waging war against the said State; *et hoc paratus est verificari*: wherefore he prays judgment whether the said plaintiff, her action against him ought to have or maintain; with this, that the said Joshua will verify that the whole of the trespass by him supposed to be committed, is for certain acts, &c., by him supposed to have been done while he was residing as a subject of the said king, and under the protection of the army of the said king, and in relation to the war aforesaid.

The plaintiff replies as to the plea of the defendant, as to the residue of the trespass, by him done as aforesaid, by him above pleaded in bar, that she by reason thereof ought not to be barred from her said action; because she says, that by the Act, &c., for granting a more effectual relief in cases of certain trespasses, in her declaration in part recited, it is also among other things enacted, that no defendant or defendants shall be admitted to plead in justification any military order, or command whatsoever of the enemy, for such occupancy: and avers, that the said commissary-general and commander-in-chief were, at the time of giving the permission or license, subjects to the said King of Great Britain, the enemy mentioned and intended by the Act aforesaid, and in the military service of the said king: wherefore seeing that the said Joshua hath acknowledged the trespass by him done as aforesaid, the said Elizabeth prays judgment and her damages, &c.

And as to the further plea of the said Joshua, to the whole of the trespass aforesaid by him pleaded in bar, the plaintiff demurs.

And the defendant on his part demurs to the plea of the plaintiff last above pleaded.

The pleadings close with joinders in demurrer, in the usual forms.

From these pleadings, and the arguments which they have produced, three questions are presented for our consideration : —

Ist. Whether the plaintiff's case is within the letter and intent of the statute on which this action is grounded?

IIdly. Whether the laws of nations give the captors, and defendant under them, rights which control the operation of the statute and bar the present suit?

IIIdly. Whether there is such an amnesty included or implied in the definitive treaty of peace, as virtually or effectually relinquishes or releases the plaintiff's demand under the said statute? . . . [In a long and learned opinion, the court answers the first question in the affirmative, and the second and third in the negative. As regards, however, the act of the commander-in-chief in giving possession from April, 1780, to March, 1783, unlike the previous act of the commissary-general, it was held that it had relation to the war and was according to the laws of war, and was covered by the amnesty implied in making the treaty; and that as regards this period the plaintiff could not recover. The course of reasoning, so far as the subject now in hand is concerned, is shown by the passages which follow.]

We must acknowledge there appears to us very great force in the observation arising from the federal compact. By this compact these States are bound together as one great independent nation; and with respect to their common and national affairs, exercise a joint sovereignty, whose will can only be manifested by the acts of their delegates in Congress assembled. As a nation they must be governed by one common law of nations; for on any other principles how can they act with regard to foreign powers; and how shall foreign powers act towards them? It seems evident that abroad they can only be known in their federal capacity. What then must be the effect? What the confusion? if each separate State should arrogate to itself a right of changing at pleasure those laws, which are received as a rule of conduct, by the common consent of the greatest part of the civilized world.

We shall deduce only one inference from what hath been here observed — that to abrogate or alter any one of the known laws or usages of nations, by the authority of a single State, must be contrary to the very nature of the confederacy, and the evident intention of the articles, by which it is established, as well as dangerous to the Union itself. . . .

It has been further objected, that Congress could form no treaty of peace to reach our internal police.

There is a great distinction between the authority of the treaty, and its operation and effects.

The first we hold to be sacred and shall never, as far as we have power, suffer it to be violated or questioned.

It is the great charter of America — it has formally and forever released us from foreign domination — it has confirmed our sovereignty and independence ; and ascertained our extensive limits.

Our Union, as has been properly observed, is known and legalized in our Constitution, and adopted as a fundamental law in the first Act of our Legislature. The federal compact hath vested Congress with full and exclusive powers to make peace and war. This treaty they have made and ratified, and rendered its obligation perpetual.

And we are clearly of opinion, that no State in this Union can alter or abridge, in a single point, the federal articles or the treaty.

But the operation and effects of the treaty, within our own State, are fit subjects of inquiry and decision : according to its spirit and true meaning we must determine our judgment ; nor shall any man, by any act of ours, be deprived of the benefits which, on a fair and reasonable construction, he ought to derive from it.

On this occasion, we say with the sage, *Fiat justitia ruat cælum*. . . .

The counsel for the defendant, by stating a number of pointed cases, showed clearly, from the nature of things, that the statute must admit of exceptions. Mr. Attorney-General, one of the counsel for the plaintiff, who argued the cause very ably, admitted that many cases may be out of the statute, though the plaintiff's is not of the number.

Thus, then, it seems to be agreed, on both sides, that the provision in the statute, being general, cannot extend to all cases, and must therefore receive a reasonable interpretation according to the intention ; and not according to the latitude of expression of the legislature : it follows as a necessary consequence, that the interpretation is the province of the court, and, however difficult the task, that we are bound to perform it.

The authorities which have been cited on the part of the defendant, not only establish this general principle, but bring forward a number of judicial decisions, wherein the courts of justice have exercised that power.

On the other side, the uncontrollable power of the legislature, and the sanctity of its laws, have been earnestly pressed by the counsel for the plaintiff ; and a great number of authorities have been quoted to establish an opinion, that the courts of justice in no case ought to exercise a discretion in the construction of a statute.

However contradictory these authorities may appear to superficial observers, they are not only capable of being reconciled, but the result of the whole will appear to be wise, suited to human imperfection and easily explained.

The supremacy of the legislature need not be called into question ;

if they think fit positively to enact a law, there is no power which can control them. When the main object of such a law is clearly expressed, and the intention manifest, the judges are not at liberty, although it appears to them to be unreasonable, to reject it; for this were to set the judicial above the legislative, which would be subversive of all government.

But when a law is expressed in general words, and some collateral matter, which happens to arise from those general words, is unreasonable, there the judges are in decency to conclude, that the consequences were not foreseen by the legislature; and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* to disregard it.

When the judicial make these distinctions, they do not control the legislature; they endeavor to give their intention its proper effect.

This is the substance of the authorities, on a comprehensive view of the subject; this is the language of Blackstone in his celebrated commentaries, and this is the practice of the courts of justice, from which we have copied our jurisprudence, as well as the models of our own internal judicatories. To apply these general remarks to the particular case under our consideration. — The American prisoners of war, in the power of the enemy, were quartered in the houses of the exiles: they in fact occupied those houses by a military order or command, and are included within the general description of the statute, which, according to the letter, extends to all persons without any exception, who have so occupied or injured such houses. But can we force ourselves to believe, that the legislature could have been so unjust and oppressive as to add to the sufferings of the patriot soldier, consigned, after fighting the battles of his country, to a long captivity, by making him pay for fetters which he had worn in the service of his country, or for want of means, to undergo a second loss of liberty?

That the legislative, judicial, and executive powers of government should be independent of each other, is essential to liberty.

This principle entered deeply into our excellent Constitution, and was one of the inducements to the establishment of the Council of Revision, that the judicial and executive of whom it is composed, might have the means of guarding their respective rights, against the encroachments of the legislature, whether by design, “or by haste or unadvisedness.” For this and other purposes, all bills, which have passed the Senate and Assembly, before they become laws, are to be presented to the council for their revisal and consideration; that if it should appear improper to them that any bill should become a law, it may be returned with their objections for further consideration, and become subject to the approbation of two-thirds of the members of each House, before it can be a law.

From this passage of our Constitution, Mr. Attorney seems to regard this determination of the Council of Revision on the law in question,

in the light of a judicial decision, by which this court ought to be guided, for the sake of uniformity in the dispensation of justice. But surely the respect, which we owe to this honorable council, ought not to carry us such lengths; it is not to be supposed, that their assent or objection to a bill can have the force of an adjudication; for what in such a case would be the fate of a law which prevailed against their sentiments? Besides, in the hurry of a session, and especially *flagrante bello*, they have neither leisure nor means to weigh the extent and consequences of a law whose provisions are general, at least not with that accuracy and solemnity which must be necessary to render their reasons incontrovertible, and their opinions absolute. The institution of this council is sufficiently useful and salutary, without ascribing to their proceedings, effects so extraordinary; nor is it probable, that the high judicial powers themselves, would in the seat of judgment always be precluded, even by their own opinion given in the Council of Revision; for instance, if they had consented to a bill, general in its provision, and in the administration of justice they discovered that, according to the letter, it comprehended cases which rendered its operation unseasonable, mischievous, and contrary to the intention of the legislature, would they not give relief? Surely it cannot be questioned.

Upon the whole, this being a statute is obligatory, and being general in its provisions, collateral matter arises out of the general words, which happens to be unseasonable. The court is therefore bound to conclude, that such a consequence was not foreseen by the legislature, to explain it by equity, and to disregard it in that point only, where it would operate thus unseasonably.

The questions then, whether this statute hath in any respect revoked the law of nations, or is repealed by the definitive treaty of peace, or foreign to the circumstances of the case: neither will happen, nor ought to be apprehended.

There is not a tittle in the treaty to which the statute is repugnant. The amnesty is constructive, and made out by reasoning from the law of nations to the treaty.

The repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the legislature passed this statute; and we think ourselves bound to exempt that law from its operation: first, because there is no mention of the law of nations, nor the most remote allusion to it, throughout the whole statute; secondly, because it is a subject of the highest national concern and of too much moment to have been intended to be struck at in silence; and to be controlled implicatively under the generality of the terms of the provision; thirdly, because the provision itself is so indefinite, that without any control it would operate in other cases unreasonably, to the oppression of the innocent, and contrary to humanity; when it is a known maxim "that a statute ought to be so construed, that no man who is innocent be punished or endamaged;" fourthly, because the statute

under our consideration doth not contain even the common *non obstante* clause, though it is so frequent in our statute book, — “and it is an established maxim, where two laws are seemingly repugnant, and there be no clause of *non obstante* in the latter, they shall, if possible, have such construction, that the latter may not repeal the former by implication;” fifthly, because although it is a true rule that *posteriores leges prioribus derogant*, to use the language of Sir Thomas Powis in the *Duchess of Hamilton's Case*, — at the same time it must be remembered, that repeals by implication are disfavored by law, and never allowed of but where the inconsistency and repugnancy are plain, glaring, and unavoidable: for these repeals carry along with them a tacit reflection upon the legislature, that they should ignorantly, and without knowing it, make one Act repugnant to and inconsistent with another; and such repeals have ever been interpreted so as to repeal as little of the precedent law as possible.

The plaintiff's counsel, who themselves argued in favor of this last proposition, adduced several authorities to support it.

Whoever then is clearly exempted from the operation of this statute by the law of nations, this court must take it for granted, could never have been intended to be comprehended within it by the legislature. . . .

We have gone further perhaps into many important subjects, which have been brought into view by this controversy, than was strictly necessary; but it is time that the law of nations and the nature and effects of treaties should be understood: and in the infancy of our republic, every proper opportunity should be embraced to inculcate a sense of national obligation, and a reverence for institutions, on which the tranquillity of mankind, considered as members of different States and communities, so essentially depends.

Besides the maxim *interest reipublice ut sit finis litium*, never applied more forcibly than it now doth to us in our present circumstances; and it is hoped by being thus explicit, we may ease the minds of a multitude of suitors whose causes are depending here under this statute — at all events we shall relieve this court from an unusual weight of judicial examination, which a want of time renders incompatible with our other public and indispensable duties.

Upon the whole, it is the opinion of this court, that the plea of the defendant as to the occupancy of the plaintiff's brew-house and malt-house, between the 28th day of September, 1778, and the last day of April, 1780; and the last plea of the defendant as to the whole of the trespass, charged in the plaintiff's declaration, are insufficient in the law; and that only the plea of the defendant in justification of the occupancy between the last day of April, 1780, and the 17th day of March, 1783, is good and sufficient in the law.

*Let judgment be entered accordingly.*<sup>1</sup>

<sup>1</sup> See Mr. Dawson's introduction for an account of the excitement to which this opinion gave rise. A meeting was called, and an address “To the People of the

TREVETT v. WEEDEN.<sup>1</sup>

SUPERIOR COURT OF JUDICATURE OF RHODE ISLAND. 1786.

UPON the last Monday of September, in the eleventh year of the Independence of the United States, in the city of Newport, and State of Rhode Island, &c., was heard, before the Superior Court of Judicature, Court of Assize, and General Jail-Delivery, a certain information, John Trevett against John Weeden, for refusing to receive the paper bills of this State, in payment for meat sold in market, equivalent to silver or gold; and upon the day following, the court delivered the unanimous opinion of the judges, that the information was not cognizable before them. [Coxe (Jud. Power and Unconst. Legis. 245) adds this: "The following constitutes the whole of the brief extant report of what was said by them:"<sup>2</sup> "The court adjourned to next morning, upon opening of which, Judge Howell, in a firm, sen-

States" was issued Nov. 4, 1784, bitterly complaining of the decision. The writers say: "From what has been said we think that no one can doubt of the meaning of the law. It remains to inquire whether a court of judicature can consistently, with our Constitution and laws, adjudge contrary to the plain and obvious meaning of a statute. That the Mayor's Courts have done so in this case we think is manifest from the foregoing remarks. That there should be a power vested in courts of judicature, whereby they might control the supreme legislative power, we think is absurd in itself. Such power in courts would be destructive of liberty, and remove all security of property. The design of courts of justice in our government from the very nature of their institution, is to *declare* laws, not to *alter* them. Whenever they depart from this design of their institution, they confound legislative and judicial powers. The laws govern where a government is free; and every citizen knows what remedy the laws give him for every injury. But this cannot be the case where courts, if they deem a law to be unreasonable, may set it aside. Here, however plainly the law may be in his favor, he cannot be certain of redress until he has the opinion of the court." This address was signed by Melancton Smith, Thomas Tucker, Peter Riker, Daniel Shaw, Jonathan Lawrence, Adam Gilchrist, Jr., Anthony Rutgers, John Wiley, Peter T. Curtin. The House of Assembly of the State at about the same time, by a vote of 25 to 15, adopted a preamble and the following resolution: "'Resolved, that the judgment aforesaid is, in its tendency, subversive of all law and good order, and leads directly to anarchy and confusion; because if a court instituted for the benefit and government of a corporation may take upon them to dispense with and act in direct violation of a plain and known law of the State, all other courts, either superior or inferior, may do the like; and therewith will end all our dear-bought rights and privileges, and legislatures become useless.' It is said," continues the editor, "that Mr. Waddington, alarmed at these manifestations, and at the threatened appeal and writ of error, soon after compromised with Mrs. Rutgers; and the entire subject became matter of history, and, soon after, was entirely forgotten by the great body of those who were most interested in the great political principles which have been involved — even those who had been most active in condemning the action of the court, appear to have thought no more of the subject."

For comments on this case see Coxe, Jud. Power & Unconst. Legis. 223. See also the *Synsbury Case*, Kirby (Conn.), 444, 447 (1785), and *Ib.* 452 (1784). — Ed.

<sup>1</sup> Pamphlet, by James M. Varnum. Providence: John Carter. 1787. An account of the case is given in 2 Chandler's Crim. Tr. 269. — Ed.

<sup>2</sup> Providence "Gazette," Oct. 7, 1786: compare American Museum, vol. 5, p. 36.

sible, and judicious speech, assigned the reasons which induced him to be of the opinion that the information was not cognizable by the court — declared himself independent as a judge — the penal law to be repugnant<sup>1</sup> and unconstitutional — and therefore gave it as his opinion that the court could not take cognizance of the information ! Judge Devol was of the same opinion. Judge Tillinghast took notice of the striking repugnancy of the expressions of the act — Without trial by jury, according to the laws of the land — and on that ground gave his judgment the same way. Judge Hazard voted against taking cognizance. The Chief Justice declared the judgment of the court without giving his own opinion.”]

That this important decision may be fully comprehended, it will be necessary to recur to the Acts of the General Assembly, which superinduced the trial. At the last May session, an Act was made for emitting the sum of one hundred thousand pounds, lawful money, in bills, upon land security, which should pass in all kinds of business and payments of former contracts, upon par with silver and gold, estimating an ounce of coined silver at six shillings and eightpence. Another Act was passed in the June following, subjecting every person who should refuse the bills in payment for articles offered for sale, or should make a distinction in value between them and silver and gold, or who should in any manner attempt to depreciate them, to a penalty of one hundred pounds, lawful money ; one moiety to the State, and the other moiety to the informer ; to be recovered before either of the Courts of General Sessions of the Peace, or the Superior Court of Judicature, &c.

Experience soon evinced the inadequacy of this measure to the objects of the administration : and at a session of the General Assembly, specially convened by his Excellency the Governor, upon the third Monday of the following August, another Act was passed, in addition to and amendment of that last mentioned, wherein it is provided, that the fine of one hundred pounds be varied ; and that for the future the fine should not be less than six, nor exceed thirty pounds, for the first offence. The mode of prosecution and trial was also changed, agreeably to the following clauses : “ That the complainant shall apply to either of the judges of the Superior Court of Judicature, &c., within this State, or to either of the judges of the Inferior Court of Common Pleas within the county where such offence shall be committed, and lodge his certain information, which shall be issued by the judge in the following form,” &c. It is then provided, that the person complained of come before a court to be specially convened by the judge, in three days ; “ that the said court, when so convened, shall proceed to the trial of said offender, and they are hereby authorized so to do, without any jury, by a majority of the judges present, according to the laws of the land, and to make adjudication and determination, and that three members be sufficient to constitute a court, and that the judgment of

<sup>1</sup> “Unjust,” in the Museum’s text.



the court, if against the offender so complained of, be forthwith complied with, or that he stand committed to the county jail, where the said court may be sitting, till sentence be performed, and that the said judgment of said court shall be final and conclusive, and from which there shall be no appeal; and in said process no essoin, protection, privilege, or injunction shall be in anywise prayed, granted, or allowed."

In consequence of a supposed violation of this Act, John Trevett exhibited his complaint to the Hon. Paul Mumford, Esq., Chief Justice of the Superior Court, at his chamber, who caused a special court to be convened; but as the information was given during the term of the court, it was referred into the term for consideration and final determination.

John Weedon, being demanded and present in court, made the following answer: "That it appears by the Act of the General Assembly, whereon said information is founded, that the said Act hath expired, and hath no force: also, for that by the said Act the matters of complaint are made triable before special courts, uncontrollable by the Supreme Judiciary Court of the State; and also for that the court is not, by said Act, authorized and empowered to impanel a jury to try the facts charged in the information; and so the same is unconstitutional and void." . . . [Omitting only the verbatim report of the writer's argument, the report continues at page 37 as follows]:—

The consequences of the foregoing determination were immediately felt. The shops and stores were generally opened, and business assumed a cheerful aspect. Few were the exceptions to a general congratulation, and lavish indeed were the praises bestowed upon the court. The dread and the idea of informations were banished together, while a most perfect confidence was placed in judicial security. The paper currency obtained a more extensive circulation, as every one found himself at liberty to receive or refuse it. The markets, which had been illy supplied, were now amply furnished, and the spirit of industry was generally diffused. Every prospect teemed with returning happiness, and nothing appeared wanting to restore union and harmony among the contending parties.

The demon however of discord was not entirely subdued; for upon the next succeeding week a summons was issued from both Houses of Assembly, requiring an immediate attendance of the judges, "to render their reasons for adjudging an Act of the General Assembly unconstitutional, and so void." Three of the judges attended, the other two being unwell. This circumstance induced the Assembly to dismiss them at that time, but they were directed to appear at the October session next following.

Accordingly three of the judges attended, and gave notice in writing to both Houses, "that they waited their pleasure." They were informed that the Assembly was ready to hear them, and would proceed immediately upon the business for which they were in attendance.

Certain ceremonies being adjusted, and the records of the court produced, the Honorable Mr. Howell, the youngest justice, addressed himself to the Assembly in a very learned, sensible, and elaborate discourse, in which he was upwards of six hours upon the floor.

He observed, that the order by which the judges were before the House might be considered as calling upon them to assist in matters of legislation, or to render the reasons of their judicial determination, as being accountable to the legislature for their judgment.

That in the former point of view, the court was ever ready, as constituting the legal counsellors of the State, to render every kind of assistance to the legislative, in framing new or repealing former laws :<sup>1</sup> but that for the reasons of their judgment upon any question judicially before them, they were accountable only to God and their own consciences.

Under the first head, the honorable gentleman pointed out the objectionable parts of the Act upon which the information was founded, and most clearly demonstrated, by a variety of conclusive arguments, that it was unconstitutional, had not the force of a law, and could not be executed. His arguments were enforced by many authorities of the first eminence, in addition to those produced upon the trial. But as this part of the subject hath in a great measure been anticipated, we shall not enter into a further detail, concluding that the legal defence of the court, in showing "that they were not accountable to the legislature for the reasons of their judgment," will be more interesting to the public.

Here it was observed, that the legislature had assumed a fact, in their summons to the judges, which was not justified or warranted by the records. The plea of the defendant, in a matter of mere surplusage, mentions the Act of the General Assembly as "unconstitutional, and so void;" but the judgment of the court simply is, "that the information is not cognizable before them." Hence it appears that the plea hath been mistaken for the judgment.

Whatever might have been the opinion of the judges, they spoke by their records, which admitted of no addition or diminution. They might have been influenced respectively by different reasons, as the whole Act was judicially before them, of which, it being general, they could judge by inspection, without confining themselves to the particular points stated in the plea. It would be out of the power, therefore, of the General Assembly to determine upon the propriety of the court's judgment, without a particular explanation. If this could be required in one instance, it might in all; and so the legislative would become the Supreme Judiciary. A perversion of power totally subversive of civil liberty!

If it be conceded, that the equal distribution of justice is as requisite to answer the purposes of government as the enacting of salutary laws,

<sup>1</sup> See *infra*, Note on Advisory Opinions, p. 175. — Ed.

it is evident that the judiciary power should be as independent as the legislative. And consequently the judges cannot be answerable for their opinion, unless charged with criminality. . . .

JUDGE TILLINGHAST observed, that nothing could have induced the gentlemen of the court to accept the office to which they were appointed, but a regard to the public good; that their perquisites were trifling, and their salaries not worth mentioning. The only recompense they expected, or could receive, was a consciousness of rectitude, which had supported them, and he was confident would support them, through every change of circumstances; that melancholy indeed would be the condition of the citizens, if the Supreme Judiciary of the State was liable to reprehension, whenever the caprice or the resentment of a few leading men should direct a public inquiry!

That, as one member of the court, he felt himself perfectly independent, while moving in the circle of his duty; and however he might be affected for the honor of the State, he was wholly indifferent about any consequences that might possibly respect himself.

That the opinion he had given resulted from mature reflection and the clearest conviction; that his conscience testified to the purity of his intentions, and he was happy in the persuasion, that his conduct met the approbation of his God!

JUDGE HAZARD. My brethren have so fully declared my sentiments upon this occasion, that I have nothing to add by way of argument. It gives me pain that the conduct of the court seems to have met the displeasure of the administration. But their obligations were of too sacred a nature for them to aim at pleasing but in the line of their duty.

It is well known that my sentiments have fully accorded with the general system of the legislature in emitting the paper currency; but I never did, I never will, depart from the character of an honest man, to support any measures, however agreeable in themselves. If there could have been a prepossession in my mind, it must have been in favor of the Act of the General Assembly; but it was not possible to resist the force of conviction. The opinion I gave upon the trial was dictated by the energy of truth: I thought it right—I still think so. Be it as it may, we derived our understanding from the Almighty, and to Him only are we accountable for our judgment.

To the observations of the judges, succeeded a very serious and interesting debate among the members, wherein many arguments and observations were adduced on both sides. At length a question was taken, “whether the Assembly was satisfied with the reasons given by the judges in support of their judgment?” It was determined in the negative.

A motion was then made, and seconded, “for dismissing the judges from their office.” . . . [A memorial and protest from the judges, dated Nov. 4, 1786, was here presented to the Assembly, and Mr. Varnum was allowed to address the House in support of it.]

The claim and demand of the judges, as stated in their memorial,

and enforced by their counsel, were followed by a concise, but rational debate, in which the fury of passion, excepting in one or two instances, surrendered to cool reflection, and prepared the way for vindicating the honor of the law, and the dignity of the State. In vain did any endeavor to recall the mind to a predetermined resolution! Truth, "which is lodged in a secret corner of the heart," exerted her gentle influence, while prejudice and malice retired abashed!

A motion was made by an honorable member, seconded, and agreed to, that the opinion of the Attorney-General be taken, and the sentiments of the other professional gentlemen requested, whether constitutionally, and agreeably to law, the General Assembly can suspend, or remove from office, the judges of the Supreme Judiciary Court, without a previous charge and statement of criminality, due process, trial, and conviction thereon? . . . [Addresses were then made by "Mr. Channing, the Attorney-General," and three others, to the effect that the judges could only be removed by impeachment or other regular process.] The two professional gentlemen in the House, the Honorable Mr. Marchant and Mr. Bourne, confirmed the sentiments of their brethren, in the leading points, by a masterly display of legal talents.

The only question remaining was, whether the judges should be discharged from any further attendance upon the General Assembly, as no accusation appeared against them? The question was put, and decided by a very great majority, "that as the judges are not charged with any criminality in rendering the judgment, upon the information, Trevett against Weeden, they are therefore discharged from any further attendance upon this Assembly, on that account."<sup>1</sup>

## DEN d. BAYARD AND WIFE v. SINGLETON.

COURT OF CONFERENCE OF NORTH CAROLINA.<sup>2</sup> 1787.

[1 *Martin*, N. C. 42.]

**EJECTMENT.** This action was brought for the recovery of a valuable house and lot, with a wharf and other appurtenances, situate in the town of Newbern.

The defendant pleaded *Not guilty*, under the common rule.

He held under a title derived from the State, by a deed, from a Superintendent Commissioner of confiscated estates.

At May Term, 1786, *Nash*, for the defendant, moved that the suit

<sup>1</sup> Cox, *Jud. Power and Unconst. Legis.*, 237-38 (and so *passim*), treats this case as one arising under an unwritten constitution. This view seems to be inadmissible. Before the Revolution, the charter of Rhode Island, so far as it went, was a written constitution. It continued to have the same character throughout. — Ed.

<sup>2</sup> This seems to have been the name of the highest court in the State, before 1805. But the name is not given in *Martin's Reports*. See 4 *Green Bag*, 457. — Ed.

be dismissed, according to an Act of the last session, entitled an Act to secure and quiet in their possession all such persons, their heirs and assigns, who have purchased or may hereafter purchase lands and tenements, goods and chattels, which have been sold or may hereafter be sold by commissioners of forfeited estates, legally appointed for that purpose, 1785, 7, 553.

The Act requires the courts, in all cases where the defendant makes affidavit that he holds the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion.

The defendant had filed an affidavit, setting forth that the property in dispute had been confiscated and sold by the commissioner of the district.

This brought on long arguments from the counsel on each side, on constitutional points.

The court made a few observations on our Constitution and system of government.

ASHE, J. observed, that at the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a marooned island, — without laws, without magistrates, without government, or any legal authority — that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system or those fundamental principles comprised in the Constitution, dividing the powers of government into separate and distinct branches, to wit: the legislative, the judicial, and executive, and assigning to each, several and distinct powers, and prescribing their several limits and boundaries: this he said without disclosing a single sentiment upon the cause of the proceeding, or the law introduced in support of it.

*Cur. adv. vult.*

At May Term, 1787, *Nash's* motion was resumed, and produced a very lengthy debate from the Bar.

Whereupon the court recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant the uncertainty that would always attend his title, if this cause should be dismissed without a trial; as upon a repeal of the present Act (which would probably happen sooner or later), suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect.

Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision, than that of the motion under the aforesaid Act. The court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the legislature and the judicial powers of the State, at length with much apparent reluctance, but with great deliberation and

firmness, gave their opinion separately, but unanimously, for overruling the aforementioned motion for the dismissal of the said suits.

In the course of which the judges observed, that the obligation of their oaths, and the duty of their office required them, in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

That they therefore were bound to declare that they considered, that whatever disabilities the persons under whom the plaintiffs were said to derive their titles, might justly have incurred, against their maintaining or prosecuting any suits in the courts of this State; yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs, being citizens of one of the United States, are citizens of this State, by the confederation of all the States; which is to be taken as a part of the law of the land, unrepealable by any Act of the General Assembly.

That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all; that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no Act they could pass, could by any means repeal or alter the Constitution, because, if they could do this, they would at the same instant of time destroy their own existence as a legislature, and dissolve the government thereby established. Consequently the Constitution (which the judicial power was bound to take notice of as much as of any other law whatever), standing in full force as the fundamental law of the land, notwithstanding the Act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.

*Nash's* motion was overruled.

And at this term the cause was tried. . . .

[The rest of the case, being immaterial as regards the present topic, is omitted.]<sup>1</sup>

<sup>1</sup> See Cox's comments on this case, *Jud. Power & Unconst. Legis.*, 248 *et seq.*; and especially the letters of Iredell, afterwards a judge of the Supreme Court of the

WEDNESDAY, March 21, 1787. . . . On the report of the Secretary to the United States for the Department of Foreign Affairs . . . Congress unanimously agreed to the following resolutions : —

*Resolved*, That the legislatures of the several States cannot of right pass any Act or Acts, for interpreting, explaining, or construing a national treaty or any part or clause of it; nor for restraining, limiting, or in any manner impeding, retarding, or counteracting the operation and execution of the same; for that on being constitutionally made, ratified, and published, they become in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them.

*Resolved*, That all such Acts or parts of Acts as may be now existing in any of the States, repugnant to the treaty of peace, ought to be forthwith repealed, as well to prevent their continuing to be regarded as violations of that treaty, as to avoid the disagreeable necessity there might otherwise be of raising and discussing questions touching their validity and obligation.

*Resolved*, That it be recommended to the several States to make such repeal rather by describing than reciting the said Acts, and for that purpose to pass an Act declaring in general terms, that all such Acts and parts of Acts, repugnant to the treaty of peace between the United States and his Britannic Majesty, or any article thereof, shall be, and thereby are repealed, and that the courts of law and equity in all causes and questions cognizable by them respectively, and arising from or touching the said treaty, shall decide and adjudge according to the true intent and meaning of the same, anything in the said Acts or parts of Acts to the contrary thereof in anywise notwithstanding. — *12 Journals of Congress* (ed. 1801), 23; COXE, *Jud. Power and Unconst. Leg.*, 387.

Friday, April 13, 1787. . . . The Secretary for Foreign Affairs having, in pursuance of an order of Congress, reported the draught of a letter to the States accompanying the resolutions, passed the 21st day of March, 1787, the same was taken into consideration and unanimously agreed to as follows: . . . Our national Constitution having committed to us the management of the national concerns with foreign States and powers, it is our duty to take care that all the rights which they ought to enjoy within our jurisdiction by the laws of nations and the faith of treaties, remain inviolate. . . .

Let it be remembered that the Thirteen Independent Sovereign States have, by express delegation of power, formed and vested in us a general, though limited, sovereignty, for the general and national purposes specified in the confederation. In this sovereignty they cannot severally participate (except by their delegates) nor with it have concurrent

United States, written in August, 1786, and August, 1787, and reprinted by Coxé (pp. 253–263) from McRee's *Life and Correspondence of James Iredell*. — Ed.

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jurisdiction ; for the ninth article of the confederation most expressly conveys to us the sole and exclusive right and power of determining on war and peace, and of entering into treaties and alliances, &c.

When, therefore, a treaty is constitutionally made, ratified, and published by us, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention of State legislatures. Treaties derive their obligation from being compacts between the sovereign of this and the sovereign of another nation ; whereas laws or statutes derive their force from being the Acts of a legislature competent to the passing of them. Hence it is clear that treaties must be implicitly received and observed by every member of the nation ; for as State legislatures are not competent to the making of such compacts or treaties, so neither are they competent in that capacity, authoritatively to decide on or ascertain the construction and sense of them. When doubts arise respecting the construction of State laws, it is not unusual nor improper for the State legislatures, by explanatory or declaratory Acts to remove those doubts. But the case between laws and compacts or treaties is in this widely different ; for when doubts arise respecting the sense and meaning of a treaty, they are so far from being cognizable by a State legislature, that the United States in Congress assembled, have no authority to settle and determine them ; for as the legislature only, which constitutionally passes a law, has power to revise and amend it, so the sovereigns only, who are parties to the treaty, have power by mutual consent and posterior articles, to correct or explain it. . . .

How far such legislative Acts would be valid and obligatory even within the limits of the State passing them, is a question which we hope never to have occasion to discuss. Certain, however, it is that such Acts cannot bind either of the contracting sovereigns, and consequently cannot be obligatory on their respective nations. . . .

Thus much we think it useful to observe, in order to explain the principles on which we have unanimously come to the following resolution, *viz.* . . . [Here is recited the first of the three resolutions given above.]

As the treaty of peace, so far as it respects the matters and things provided for in it, is a law to the United States which cannot by all or any of them be altered or changed, all State Acts establishing provisions relative to the same objects which are incompatible with it, must in every point of view be improper. Such Acts do nevertheless exist ; but we do not think it necessary either to enumerate them particularly, or to make them severally the subjects of discussion. It appears to us sufficient to observe and insist, that the treaty ought to have free course in its operation and execution, and that all obstacles interposed by State Acts be removed. We mean to act with the most scrupulous regard to justice and candor towards Great Britain, and with an equal degree of delicacy, moderation, and decision towards the States who have given occasion to these discussions.



For these reasons we have in general terms . . . [Here the second resolution is inserted.]

Although this resolution applies strictly only to such of the States as have passed the exceptionable Acts alluded to, yet to obviate all future disputes and questions, as well as to remove those which now exist, we think it best that every State without exception should pass a law on the subject. We have therefore . . . [Here the third resolution is inserted.]

Such laws would answer every purpose and be easily formed. The more they were of the like tenor throughout the States the better. They might each recite . . . [Here is inserted the draught of a statute, embodying what the resolutions advised.]

Such a general law would, we think, be preferable to one that should minutely enumerate the Acts and clauses intended to be repealed, because omissions might accidentally be made in the enumeration, or questions might arise, and perhaps not be satisfactorily determined, respecting particular Acts or clauses, about which contrary opinions may be entertained. By repealing in general terms all Acts and clauses repugnant to the treaty, the business will be turned over to its proper department, *viz.*, the judicial, and the courts of law will find no difficulty in deciding whether any particular Act or clause is or is not contrary to the treaty. . . .

By order of Congress.

(Signed)

ARTHUR ST. CLAIR, President.<sup>1</sup>

— *Ib.* 32; COXE, *ubi supra*, 388.

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#### NOTE.

##### PASSAGES FROM THE FEDERALIST.

ONE of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. . . . In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct. The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point. The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. . . . This great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning, in this case, let us

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<sup>1</sup> See Mass. Stat. 1786, c. 86, passed, in the form recommended by Congress, on April 30, 1787. — Ed.

recur to the source from which the maxim was drawn. On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative Acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depository of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote. From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. . . . If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. — *The Federalist* (Lodge's ed.), No. 47<sup>1</sup> (MADISON).

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved. Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defence is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. . . . In a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all

<sup>1</sup> For comments on the *Federalist*, a collection of papers published at intervals in 1787 and 1788, with the object of securing the adoption of the Federal Constitution, see Maine, *Popular Govt.*, Essay IV. I have inserted here all such parts of the *Federalist* as seem important for the purposes of this book. — ED.

their precautions. The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former. — *Ib.* No. 48 (MADISON).

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. — Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention. In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them. . . . But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. . . . But it is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defence with which the executive magistrate should be armed. But

perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. — *Ib.* No. 51 (HAMILTON or MADISON).

A review of the principal objections that have appeared against the proposed court for the trial of impeachments, will not improbably eradicate the remains of any unfavorable impressions which may still exist in regard to this matter. The first of these objections is, that the provision in question confounds legislative and judiciary authorities in the same body, in violation of that important and well-established maxim which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place, and has been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper but necessary to the mutual defence of the several members of the government against each other. An absolute or qualified negative in the executive upon the acts of the legislative body, is admitted, by the ablest adepts in political science, to be an indispensable barrier against the encroachments of the latter upon the former. And it may, perhaps, with no less reason be contended, that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the encroachments of the executive. The division of them between the two branches of the legislature, assigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalence of a factious spirit in either of those branches. As the concurrence of two thirds of the Senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire. It is curious to observe, with what vehemence this part of the plan is assailed, on the principle here taken notice of, by men who profess to admire, without exception, the Constitution of this State [New York]; while that Constitution makes the Senate, together with the chancellor and judges of the Supreme Court, not only a court of impeachments, but the highest judicatory in the State, in all causes, civil and criminal. The proportion, in point of numbers, of the chancellor and judges to the senators, is so inconsiderable, that the judiciary authority of New York, in the last resort, may, with truth, be said to reside in its Senate. If the plan of the convention be, in this respect, chargeable with a departure from the celebrated maxim which has been so often mentioned, and seems to be so little understood, how much more culpable must be the Constitution of New York.<sup>1</sup> — *Ib.* No. 66 (HAMILTON).

There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome. There can be no

<sup>1</sup> In that of New Jersey, also, the final judiciary authority is in a branch of the legislature. In New Hampshire, Massachusetts, Pennsylvania, and South Carolina, one branch of the legislature is the court for the trial of impeachments. — PUBLIUS.

need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government. Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention? The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers. The ingredients which constitute safety in the republican sense are, first, a due dependence on the people; secondly, a due responsibility. Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand; while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests. That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished. — *Id.* No. 70 (HAMILTON).

The last of the requisites to energy, which have been enumerated, are competent powers. Let us proceed to consider those which are proposed to be vested in the President of the United States. The first thing that offers itself to our observation, is the qualified negative of the President upon the Acts or resolutions of the two Houses of the legislature; or, in other words, his power of returning all bills with objections, to have the effect of preventing their becoming laws, unless they should afterwards be ratified by two thirds of each of the component members of the legislative body. The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defence. But the power in question has a further use. It not only serves as a shield to the Executive, but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body. — *Id.* No. 73 (HAMILTON).

The President is to have power, "by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur." . . . With regard to the intermixture of powers, I shall rely upon the explanations already given in other places, of the true sense of the rule upon which that objection is founded; and shall take it for granted, as an inference from them, that the union of the Executive with the Senate, in the article of treaties, is no infringement of that rule. I venture to add, that

the particular nature of the power of making treaties indicates a peculiar propriety in that union. Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enactment of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the Executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them. — *Ib.* No. 75 (HAMILTON).

We have now completed a survey of the structure and powers of the executive department, which, I have endeavored to show, combines, as far as republican principles will admit, all the requisites to energy. The remaining inquiry is: Does it also combine the requisites to safety, in a republican sense, — a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; from the election of the President once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people? — *Ib.* No. 77 (HAMILTON).

We proceed now to an examination of the judiciary department of the proposed government. . . .

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices during good behavior; which is conformable to the most approved of the State constitutions, and among the rest, to that of this State [New York]. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties

and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power;<sup>1</sup> that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and Executive powers."<sup>2</sup> And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.<sup>3</sup>

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all Acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative Acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the Acts of another void, must necessarily be superior to the one whose Acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative Act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the

<sup>1</sup> The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing." — *Spirit of Laws*, vol. i. page 186. — PUBLIUS.

<sup>2</sup> *Idem*, page 181. — PUBLIUS.

<sup>3</sup> This number of the Federalist was published in May, 1788. In May, 1787, the General Assembly of Rhode Island is said to have removed from office four of the judges who had decided the case of *Trevett v. Weeden*, ante, p. 73 (2 Arnold's Hist. R. I. 536), retaining only the Chief Justice. This is understood to mean that these judges at the annual election by the legislature were dropped. — Ed.

other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular Act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an equal authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of design-



ing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies,<sup>1</sup> in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative Act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an Act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has

<sup>1</sup> *Vide* "Protest of the Minority of the Convention of Pennsylvania," Martin's Speech, etc. — PUBLIUS.

been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution. — *Ib.* No. 78<sup>1</sup> (HAMILTON).

There ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States. As to the second point, it is impossible, by any argument or comment, to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. — *Ib.* No. 80 (HAMILTON).

That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested. The reasons for it have been assigned in another place, and are too obvious to need repetition. The only question that seems to have been raised concerning it, is, whether it ought to be a distinct body or a branch of the legislature. The same contradiction is observable in regard to this matter which has been remarked in several other cases. The very men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes, in the whole or in a part of the legislative body.

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<sup>1</sup> Compare Federalist, No. 44. — ED.

The arguments, or rather suggestions, upon which this charge is founded, are to this effect: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the spirit of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless." This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, is equally applicable to most, if not to all the State governments. There can be no objection, therefore, on this account, to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the Supreme Court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of the State. To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a part of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them, would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges. Nor is this all. Every reason which recommends the tenure of good behavior for judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides will be too apt to stifle the voice both of law and of equity.

These considerations teach us to applaud the wisdom of those States who have com-

mitted the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the Constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to those models is highly to be commended.

It is not true, in the second place, that the Parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory, neither of the British, nor the State constitutions, authorizes the revisal of a judicial sentence by a legislative Act. Nor is there anything in the proposed Constitution, more than in either of them, by which it is forbidden. In the former, as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent, to the State governments, as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments. — *Ib.* No. 81 (HAMILTON).

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### VANHORNE'S LESSEE *v.* DORRANCE.

CIRCUIT COURT OF THE UNITED STATES, PENNSYLVANIA DISTRICT.  
1795.

[2 *Dallas*, 304.]

THIS was a cause of great expectation, involving several important questions of constitutional law, in relation to the territorial controversy between the States of Pennsylvania and Connecticut. After a trial, which continued for fifteen days, the presiding judge delivered the following charge to the jury, comprising a full review of all the important facts and principles that had occurred during the discussion.

PATTERSON, J. Having arrived at the last stage of this long and

interesting cause, it now becomes the duty of the court to sum up the evidence, and to declare the law arising upon it. A mass of testimony has been brought forward in the course of the trial, the far greater part of which is altogether immaterial, and can be of no use in forming a decision. The great points, on which the cause turns, are of a legal nature; they are questions of law; and, therefore, for the sake of the parties, as well as for my own sake, they ought to be put in a train for ultimate adjudication by the Supreme Court. In the administration of justice it is a consolatory idea, that no opinion of a single judge can be final and decisive; but that the same may be removed before the highest tribunal for revision, where, if erroneous, it will be rectified. For the sake of clearness, I shall consider,

1st. The title of the plaintiff.

2d. The title of the defendant. . . .

Such is the title upon which the plaintiff rests his cause. It is clearly deduced and legally correct; and, therefore, unless sufficient appears on the part of the defendant, will entitle the plaintiff to your verdict. To repel the plaintiff's right, and to establish his own, the defendant sets up a title.

1st. Under Connecticut. 2d. Under the Indians. 3d. Under Pennsylvania. . . . [Under the first two the defendant is declared to have no title.]

III. The title which the defendant sets up under Pennsylvania.

This is the keystone of the defendant's title, as one of his counsel very properly expressed it. It required no great sagacity to perceive that the defendant's hope of success was founded on a law of Pennsylvania, commonly called "the quieting and confirming Act." . . . To aid you, gentlemen, in forming a verdict, I shall consider:

I. The constitutionality of the confirming Act; or, in other words, whether the legislature had authority to make that Act?

Legislation is the exercise of sovereign authority. High and important powers are necessarily vested in the legislative body; whose Acts, under some forms of government, are irresistible and subject to no control. In England, from whence most of our legal principles and legislative notions are derived, the authority of the Parliament is transcendent and has no bounds.

"The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, *Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima*. It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute, despotic power which must in all governments reside somewhere, is intrusted by the Constitution of these

kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the Crown, as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land, as was done in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the Constitution of the kingdom and of Parliaments themselves, as was done by the Act of Union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo." — 1 *Bl. Com.* 160.

From this passage it is evident that, in England, the authority of the Parliament runs without limits, and rises above control. It is difficult to say what the Constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament: it bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice. Some of the judges in England have had the boldness to assert that an Act of Parliament, made against natural equity, is void; but this opinion contravenes the general position, that the validity of an Act of Parliament cannot be drawn into question by the judicial department: it cannot be disputed, and must be obeyed. The power of Parliament is absolute and transcendent; it is omnipotent in the scale of political existence. Besides, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: every State in the Union has its Constitution reduced to written exactitude and precision.

What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: it is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes limits to the exercise of legislative authority, and

prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every Act of the Legislature, repugnant to the Constitution, is absolutely void.

In the second article of the Declaration of Rights, which was made part of the late Constitution of Pennsylvania, it is declared, "that all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that no man ought or of right can be compelled, to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to or against his own free will and consent; nor can any man who acknowledges the being of a God be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship; and that no authority can, or ought to be, vested in or assumed by any power whatever, that shall, in any case, interfere with, or in any manner control, the right of conscience in the free exercise of religious worship." — *Dec. of Rights, Art. 2.*

In the thirty-second section of the same Constitution, it is ordained, "that all elections, whether by the people or in general assembly, shall be by ballot, free and voluntary." — *Const. Penn. § 32.*

Could the legislature have annulled these articles, respecting religion, the rights of conscience, and elections by ballot? Surely, no. As to these points, there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. If the legislature had passed an Act declaring that, in future, there should be no trial by jury, would it have been obligatory? No; it would have been void for want of jurisdiction, or constitutional extent of power. The right of trial by jury is a fundamental law, made sacred by the Constitution, and cannot be legislated away. The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves. I take it to be a clear position, that if a legislative Act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the Constitution, and to declare the Act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost

sight of, that the judiciary in this country is not a subordinate, but co-ordinate, branch of the government.

Having made these preliminary observations, we shall proceed to contemplate the quieting and confirming Act, and to bring its validity to the test of the Constitution.

In the course of argument, the counsel on both sides relied upon certain parts of the late Bill of Rights and Constitution of Pennsylvania, which I shall now read, and then refer to them occasionally in the sequel of the charge.

(The judge then read the 1st, 8th, and 11th articles of the Declaration of Rights; and the 9th and 46th sections of the Constitution of Pennsylvania. See 1 Vol. Dall. Edit. Penn. Laws, pp. 55, 56, 60, in the Appendix.)

From these passages it is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law. Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind; the Parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power, and not of right. Such an Act would be a monster in legislation, and shock all mankind. The legislature, therefore, had no authority to make an Act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own case. The next step in the line of progression is, whether the legislature had authority to make an Act, divesting one citizen of his freehold and vesting it in another, even with compensation. That the legislature, on certain emergencies, had authority to exercise this high power, has been urged from the nature of the social compact, and from the words of the Constitu-



tion, which says, that the House of Representatives shall have all other powers necessary for the legislature of a free State or commonwealth ; but they shall have no power to add to, alter, abolish, or infringe any part of this Constitution. The course of reasoning, on the part of the defendant, may be comprised in a few words. The despotic power, as it is aptly called by some writers, of taking private property, when State necessity requires, exists in every government ; the existence of such power is necessary ; government could not subsist without it ; and if this be the case, it cannot be lodged anywhere with so much safety as with the legislature. The presumption is, that they will not call it into exercise except in urgent cases, or cases of the first necessity. There is force in this reasoning. It is, however, difficult to form a case, in which the necessity of a State can be of such a nature as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. It is immaterial to the State in which of its citizens the land is vested ; but it is of primary importance that, when vested, it should be secured, and the proprietor protected in the enjoyment of it. The Constitution encircles and renders it an holy thing. We must, gentlemen, bear constantly in mind, that the present is a case of landed property, vested by law in one set of citizens, attempted to be divested, for the purpose of vesting the same property in another set of citizens. It cannot be assimilated to the case of personal property taken or used in time of war or famine, or other extreme necessity ; it cannot be assimilated to the temporary possession of land itself, on a pressing public emergency, or the spur of the occasion. In the latter case there is no change of property, no divestment of right ; the title remains, and the proprietor, though out of possession for a while, is still proprietor and lord of the soil. The possession grew out of the occasion and ceases with it : then the right of necessity is satisfied and at an end ; it does not affect the title, is temporary in its nature, and cannot exist forever. The Constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the Constitution. It is sacred ; for, it is further declared, that the legislature shall have no power to add to, alter, abolish, or infringe any part of, the Constitution. The Constitution is the origin and measure of legislative authority ; it says to legislators, thus far ye shall go and no further. Not a particle of it should be shaken ; not a pebble of it should be removed. Innovation is dangerous. One encroachment leads to another ; precedent gives birth to precedent ; what has been done may be done again ; thus radical principles are generally broken in upon, and the Constitution eventually destroyed. Where is the security, where the inviolability of property, if the legislature, by a private Act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another ? The rights of private property are regulated, protected, and governed by general, known, and established laws ; and

decided upon by general, known, and established tribunals; laws and tribunals not made and created on an instant exigency, on an urgent emergency, to serve a present turn, or the interest of a moment. Their operation and influence are equal and universal; they press alike on all. Hence security and safety, tranquillity and peace. One man is not afraid of another, and no man afraid of the legislature. It is infinitely wiser and safer to risk some possible mischiefs, than to vest in the legislature so unnecessary, dangerous, and enormous a power as that which has been exercised on the present occasion; a power that, according to the full extent of the argument, is boundless and omnipotent: for the legislature judged of the necessity of the case, and also of the nature and value of the equivalent.

Such a case of necessity, and judging too of the compensation, can never occur in any nation. Singular, indeed, and untoward must be the state of things, that would induce the legislature, supposing they had the power, to divest one individual of his landed estate merely for the purpose of vesting it in another, even upon full indemnification; unless that indemnification be ascertained in the manner which I shall mention hereafter.

But admitting that the legislature can take the real estate of A. and give it to B. on making compensation, the principle and reasoning upon it go no further than to show, that the legislature are the sole and exclusive judges of the necessity of the case, in which this despotic power should be called into action. It cannot, on the principles of the social alliance, or of the Constitution, be extended beyond the point of judging upon every existing case of necessity. The legislature declare and enact, that such are the public exigencies, or necessities of the State, as to authorize them to take the land of A. and give it to B.; the dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract, and the Constitution, direct, and they accordingly declare and ordain, that A. shall receive compensation for the land. But here the legislature must stop; they have run the full length of their authority, and can go no further: they cannot constitutionally determine upon the amount of the compensation, or value of the land. Public exigencies do not require, necessity does not demand, that the legislature should, of themselves, without the participation of the proprietor, or intervention of a jury, assess the value of the thing, or ascertain the amount of the compensation to be paid for it. This can constitutionally be effected only in three ways.

1. By the parties; that is, by stipulation between the legislature and proprietor of the land.

2. By commissioners mutually elected by the parties.

3. By the intervention of a jury.

The compensatory part of the Act lies in the ninth section. . . . In this section two things are worthy of consideration.

1. The mode or manner in which compensation for the lands is to be ascertained.

2. The nature of the compensation itself.

The Pennsylvania claimants are directed to present their claims to the Board of Property — and what is the Board to do thereupon? Why, it is,

1. To judge of the validity of their claims.

2. To ascertain, by the aid and through the medium of commissioners, appointed by the legislature, the quality and value of the land.

3. To judge of the quantity of vacant land to be granted as an equivalent.

This is not the constitutional line of procedure. I have already observed, that there are but three modes, in which matters of this kind can be conducted consistently with the principles and spirit of the Constitution, and social alliance. The first of which is by the parties, that is to say, by the legislature and proprietor of the land. Of this the British history presents an illustrious example in the case of the Isle of Man.

“The distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue (it affording a commodious asylum for debtors, outlaws, and smugglers) authority was given to the treasury, by statute 12 Geo. I. c. 28, to purchase the interest of the then proprietors for the use of the Crown; which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. c. 26 and 38, whereby the whole island and all its dependencies, so granted, as aforesaid (except the landed property of the Atholl family, their manorial rights and emoluments, and the patronage of bishoprics, and other ecclesiastical benefices) are unalienably vested in the Crown, and subjected to the regulations of the British excise and customs.” — 1 *Bl. Com.* 107.

Shame to American legislation! That in England, a limited monarchy, where there is no written constitution, where the Parliament is omnipotent, and can mould the Constitution at pleasure, a more sacred regard should have been paid to property, than in America, surrounded as we are with a blaze of political illumination; where the legislatures are limited; where we have republican governments, and written constitutions, by which the protection and enjoyment of property are rendered inviolable.

The case of the Isle of Man was a fair and honorable stipulation; it partook of the spirit and essence of a contract; it was free and mutual; and was treating with the proprietors on equal terms. But if the business cannot be effected in this way, then the value of the land, intended to be taken, should be ascertained by commissioners, or persons mutually elected by the parties, or by the intervention of the judiciary, of which a jury is a component part. In the first case, we approximate nearly to a contract; because the will of the party, whose property is to be affected, is in some degree exercised; he has a choice; his own act co-operates with that of the legislature. In the other case, there is the intervention of a court of law, or, in other words, a jury is to

pass between the public and the individual, who, after hearing the proofs and allegations of the parties, will, by their verdict, fix the value of the property, or the sum to be paid for it. The compensation, if not agreed upon by the parties or their agents, must be ascertained by a jury. The interposition of a jury is, in such case, a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public utility. By the confirming Act, the value of the land taken, and the value of the land to be paid in recompense, are to be ascertained by the Board of Property. And who are the persons that constitute this Board? Men appointed by one of the parties, by the legislature only. The person, whose property is to be divested and valued, had no volition, no choice, no co-operation in the appointment; and besides, the other constitutional guard upon property, that of a jury, is removed and done away. The Board of Property thus constituted, are authorized to decide upon the value of the land to be taken, and upon the value of the land to be given by way of equivalent, without the participation of the party, or the intervention of a jury.

## 2. The nature of the compensation.

By the Act the equivalent is to be in land. No just compensation can be made except in money. Money is a common standard, by comparison with which the value of anything may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or anything else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalize the Act, and make it valid; nothing short of it will have the effect. It is obvious, that if a jury pass upon the subject, or value of the property, their verdict must be in money.

To close this part of the discourse: It is contended that the legislature must judge of the necessity of interposing their despotic authority; it is a right of necessity upon which no other power in government can decide: that no civil institution is perfect; and that cases will occur, in which private property must yield to urgent calls of public utility or general danger. Be it so. But then it must be upon complete indemnification to the individual. Agreed: but who shall judge of this? Did there also exist a State necessity, that the legislature, or persons solely appointed by them, must admeasure the compensation, or value of the lands seized and taken, and the validity of the title thereto? Did a third State necessity exist, that the proprietor must take land by way of equivalent for his land? And did a fourth State necessity exist, that the value of this land equivalent must be adjusted

by the Board of Property, without the consent of the party, or the interference of a jury? Alas! how necessity begets necessity. They rise upon each other and become endless. The proprietor stands afar off, a solitary and unprotected member of the community, and is stripped of his property, without his consent, without a hearing, without notice, the value of that property judged upon without his participation, or the intervention of a jury, and the equivalent therefor in lands ascertained in the same way. If this be the legislation of a republican government, in which the preservation of property is made sacred by the Constitution, I ask, wherein it differs from the mandate of an Asiatic prince? Omnipotence in legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of laws, of courts, or constitutions, and call ourselves free! In short, gentlemen, the confirming Act is void; it never had constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made.

II. But, admitting the confirming Act to be constitutional and valid, the next subject of inquiry is, what is its operation, or, in other words, what construction ought to be put upon it? . . . [It is declared that the Act only purported to vest the estate in the Connecticut claimants on certain conditions, which have not been performed.]

III. The nature and operation of the suspending Act.

This Act was passed the 29th of March, 1788, and is as follows:  
(Here the Judge read the Act at large.)

This Act was passed before the adoption of the Constitution of the United States, and therefore is not affected by it. If the legislature had authority to make the confirming Act, they had, also, authority to suspend it. Their constitutional power reached to both, or to neither. By the Act of the 28th of March, 1787, the commissioners were to ascertain and confirm the claims of the Connecticut settlers, upon the doing whereof the estate, if the law was constitutional, would become vested in them. This has not been done; the claim in the present instance has not been ascertained and confirmed; and as this Act suspends or revokes these ascertaining and confirming powers, it never can be done. Of course, there is an end of the business. The parties are placed on their original ground; they are restored to their pristine situation.

IV. After the opinion delivered on the preceding questions, it is not necessary to determine upon the validity of the repealing law. But it being my intention in this charge to decide upon all the material points in the cause, in order that the whole may, at once, be carried before the Supreme Judicature for revision, I shall detain you, gentlemen, a few minutes only, while I just touch upon the constitutionality

of the repealing Act. This Act was passed the 1st of April, 1790 : the repealing part is as follows.

(Here the Judge read the 1st and 2d sections of the Act. See 2 Vol. Dall. Edit. Penn. Laws, p. 786.)

This Act was made after the adoption of the Constitution of the United States, and the argument is, that it is contrary to it.

1. Because it is an *ex post facto* law.

2. Because it is a law impairing the obligation of a contract.

1. That it is an *ex post facto* law. But what is the fact? If making a law be a fact within the words of the Constitution, then no law, when once made, can ever be repealed. Some of the Connecticut settlers presented their claims to the commissioners, who received and entered them. These are facts. But are they facts of any avail? Did they give any right or vest any estate? No—whether done or not done, they leave the parties just where they were. They create no interest, affect no title, change no property; when done they are useless and of no efficacy. Other Acts were necessary to be performed, but before the performance of them, the law was suspended and then repealed.

2. It impairs the obligation of a contract, and is therefore void. If the property to the lands in question had been vested in the State of Pennsylvania, then the legislature would have had the liberty and right of disposing or granting them to whom they pleased, at any time, and in any manner. Over public property they have a disposing and controlling power, over private property they have none, except, perhaps, in certain cases, and those under restrictions, and except also, what may arise from the enactment and operation of general laws respecting property, which will affect themselves as well as their constituents. But if the confirming Act be a contract between the Legislature of Pennsylvania and the Connecticut settlers, it must be regulated by the rules and principles which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the Pennsylvania claimants, who are third persons, of their just rights; rights ascertained, protected, and secured by the Constitution and known laws of the land. The plaintiff's title to the land in question is legally derived from Pennsylvania; how then, on the principles of contract, could Pennsylvania lawfully dispose of it to another? As a contract, it could convey no right, without the owner's consent; without that, it was fraudulent and void.

I shall close the discourse with a brief recapitulation of its leading points.

1. The confirming Act is unconstitutional and void. It was invalid from the beginning, had no life or operation, and is precisely in the same state, as if it had not been made. If so, the plaintiff's title remains in full force.

2. If the confirming Act is constitutional, the conditions of it have not been performed; and, therefore, the estate continues in the plaintiff.

3. The confirming Act has been suspended — and
4. Repealed.

The result is, that the plaintiff is, by law, entitled to recover the premises in question, and of course to your verdict.

*Verdict for the plaintiff.<sup>1</sup>*

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### COOPER v. TELFAIR.

SUPREME COURT OF THE UNITED STATES. 1800.

[4 *Dallas*, 14; 1 *Curtis's Decisions*, 314.]

THIS was a writ of error to the Circuit Court of the United States for the District of Georgia. The plaintiff in error brought an action of debt on a bond dated in 1774, against the defendant, as obligor. The defendant pleaded that by an Act of the Legislature of the State of Georgia, passed on the 4th day of May, 1782, the plaintiff and other persons named in the Act, were banished from the State, and their property, real and personal, including all debts due to each of them at the date thereof, was confiscated to the State, such persons being at the same time declared by the Act guilty of high treason. That by virtue of this Act, and another Act passed on the 10th day of February, 1787, giving certain powers to the auditors of the State, this debt became vested in the State of Georgia, and no cause of action hath accrued to the plaintiff. To this plea the plaintiff replied, in substance, that he had never been tried, convicted, or attainted of treason, and that the Acts relied on were repugnant to the Constitution of Georgia, adopted on the 5th day of February, 1777, and so were void. To this replication there was a demurrer, which was joined, and the Circuit Court held the plea good. The cause was argued by *E. Tilghman*, for the plaintiff, and by *Ingersoll* and *Dallas* for the defendant.

<sup>1</sup> For the early cases in the Federal Courts, see Meigs, 19 Am. Law Rev. 186. The case in the text appears to be the earliest Federal decision. The informal utterances of the Circuit Court Judges, in letters and memoranda, reported in the note to *Hayburn's Case*, 4 Dall. 409, in 1792, announce their opinions, that an Act of Congress of March 23, 1792 (1 St. at Large, 243), was unconstitutional; just as Chief Justice Jay and several of the judges of the Supreme Court, in 1790, in a letter intended for the President, had made a like declaration as to a part of the Judiciary Act of 1789. See 4 Am. Jurist, 293; 2 Story, Const. s. 1579, note. But in these there was no judicial utterance. In the case of *Yale Todd* (February, 1794), preserved in a note to *U. S. v. Ferreira*, 13 How. 52, it was decided that the theory of the legislation of March 23, 1792, adopted by some of the judges, viz., that it gave them authority to act as commissioners, was untenable. It is inaccurate to say that this case holds the Act of 1792 to be unconstitutional, as appears to be said in the note in 13 How. 52, and as is expressly said in the Reporter's note in 131 U. S., Appendix, ccxxxv.

*Marbury v. Madison* is the earliest Federal decision in the Supreme Court. — ED.

The judges (except the Chief Justice, who had decided the cause in the Circuit Court) delivered their opinions, *seriatim*, in substance, as follows :

WASHINGTON, J. The Constitution of Georgia does not expressly interdict the passing of an Act of attainder and confiscation, by the authority of the legislature. Is such an Act, then, so repugnant to any constitutional regulation, as to be excepted from the legislative jurisdiction, by a necessary implication? Where an offence is not committed within some county of the State, the Constitution makes no provision for a trial, neither as to the place, nor as to the manner. Is such an offence (perhaps the most dangerous treason) to be considered as beyond the reach of the government, even to forfeit the property of the offender, within its territorial boundary? If the plaintiff in error had shown that the offence with which he was charged had been committed in any county of Georgia, he might have raised the question of conflict and collision, between the Constitution and the law ; but as that fact does not appear, there is no ground on which I could be prepared to say that the law is void. The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated.

CHASE, J. I agree, for the reason which has been assigned, to affirm the judgment. Before the plaintiff in error could claim the benefit of a trial by jury, under the Constitution, it was, at least, incumbent upon him to show, that the offence charged was committed in some county of Georgia, in which case alone the Constitution provides for the trial. But even if he had established that fact, I should not have thought the law a violation of the Constitution. The general principles contained in the Constitution are not to be regarded as rules to fetter and control, but as matter merely declaratory and directory ; for, even in the Constitution itself, we may trace repeated departures from the theoretical doctrine, that the legislative, executive, and judicial powers should be kept separate and distinct.

There is, likewise, a material difference between laws passed by the individual States during the Revolution, and laws passed subsequent to the organization of the Federal Constitution. Few of the Revolutionary Acts would stand the rigorous test now applied ; and although it is alleged that all Acts of the Legislature, in direct opposition to the prohibitions of the Constitution, would be void, yet it still remains a question, where the power resides to declare it void. It is, indeed, a general opinion, it is expressly admitted by all this Bar, and some of the judges have, individually, in the circuits, decided that the Supreme Court can declare an Act of Congress to be unconstitutional, and, therefore, invalid ; but there is no adjudication of the Supreme Court itself upon the point. I concur, however, in the general sentiment, with reference to the period, when the existing Constitution came into operation ; but whether the power, under the existing Constitution, can be employed to invalidate laws previously enacted, is a very different question, turn-



ing upon very different principles, and with respect to which I abstain from giving an opinion, since, on other ground, I am satisfied with the correctness of the judgment of the Circuit Court.

PATERSON, J. I consider it a sound political proposition, that wherever the legislative power of a government is undefined it includes the judicial and executive attributes. The legislative power of Georgia, though it is in some respects restricted and qualified, is not defined by the Constitution of the State. Had, then, the legislature power to punish its citizens, who had joined the enemy, and could not be punished by the ordinary course of law? It is denied, because it would be an exercise of judicial authority. But the power of confiscation and banishment does not belong to the judicial authority, whose process could not reach the offenders; and yet it is a power that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature that it cannot be divested or transferred, without an express provision of the Constitution.

The constitutions of several of the other States of the Union contain the same general principles and restrictions; but it never was imagined that they applied to a case like the present, and to authorize this court to pronounce any law void, it must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative application.

CUSHING, J. Although I am of opinion that this court has the same power that a court of the State of Georgia would possess, to declare the law void, I do not think that the occasion would warrant an exercise of the power. The right to confiscate and banish, in the case of an offending citizen, must belong to every government. It is not within the judicial power, as created and regulated by the Constitution of Georgia, and it naturally, as well as tacitly, belongs to the legislature.

By THE COURT. Let the judgment be affirmed, with costs.

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### MARBURY v. MADISON.

SUPREME COURT OF THE UNITED STATES. 1803.

[1 *Cranch*, 137; 1 *Curtis's Decisions*, 368.]

At the last term, namely, December Term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, *Charles Lee, Esq.*, late Attorney-General of the United States, severally moved the court for a rule to James Madison, Secretary of State of the United States, to show cause why a *mandamus* should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the

District of Columbia. This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late President of the United States, nominated the applicants to the Senate for their advice and consent to be appointed justices of the peace of the District of Columbia; that the Senate advised and consented to the appointments; that commissions in due form were signed by the said President appointing them justices, &c., and that the seal of the United States was in due form affixed to the said commissions by the Secretary of State; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison, as Secretary of State of the United States, at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the Secretary of State or any officer in the Department of State; that application has been made to the Secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the Senate, who has declined giving such a certificate; whereupon a rule was laid to show cause on the fourth day of this term. This rule having been duly served,

Mr. Lee read the affidavit of Dennis Ramsay, and the printed journals of the Senate of 31st January, 1803, respecting the refusal of the Senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the Department of State, and not bound to disclose any facts relating to the business or transactions in the office.

The court ordered the witnesses to be sworn, and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

Mr. Lincoln, Attorney-General, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as Secretary of State at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as Secretary of State.

The questions being written, were then read and handed to him.

He repeated the ideas he had before suggested, and said his objections were of two kinds.

1st. He did not think himself bound to disclose his official transactions while acting as Secretary of State; and,

2d. He ought not to be compelled to answer anything which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

The court said that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that anything was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state anything which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.

The court granted it, and postponed further consideration of the cause till the next day.

At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last, which he did not think himself obliged to answer fully. The question was, what had been done with the commissions? He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.

The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison it was immaterial to the present cause what had been done with them by others.

Afterwards, on the 24th February, the following opinion of the court was delivered by the CHIEF JUSTICE. At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the Secretary of State to show cause why a *mandamus* should not issue, directing him to deliver to William Marbury his commission

as a justice of the peace for the county of Washington, in the District of Columbia.

No cause has been shown, and the present motion is for a *mandamus*. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

These principles have been, on the side of the applicant, very ably argued at the Bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands? . . .

Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry, which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? . . .

It is then the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2dly. The power of this court.

1st. The nature of the writ. . . .

This, then, is a plain case for a *mandamus*, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court. . . . The authority, therefore, given to the Supreme Court, by the Act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an Act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative Act repugnant to it; or, that the legislature may alter the Constitution by an ordinary Act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative Acts, and, like other Acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative Act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an Act of the Legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an Act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an Act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such Act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of

itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative Act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice

without respect to persons, and do equal right to the poor and to the rich ; and that I will faithfully and impartially discharge all the duties incumbent on me as \_\_\_\_\_, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government — if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned ; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void ; and that courts, as well as other departments, are bound by that instrument.

*The rule must be discharged.*

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### FLETCHER v. PECK.

SUPREME COURT OF THE UNITED STATES. 1810.

[6 Cranch, 87 ; 2 Curtis's Decisions, 328.]

ERROR to the Circuit Court of the United States for the District of Massachusetts, in an action of covenant brought by Fletcher against Peck. . . .

The plaintiff sued out his writ of error, and the case was twice argued, first by *Martin*, for the plaintiff in error, and by *J. Q. Adams*, and *R. G. Harper*, for the defendant, at February Term, 1809, and again at this term by *Martin*, for the plaintiff, and by *Harper* and *Story*, for the defendant. . . .

March 16, 1810. MARSHALL, C. J., delivered the opinion of the court as follows :

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

This suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the



State of Georgia, the contract for which was made in the form of a bill passed by the legislature of that State.

The first count in the declaration set forth a breach in the second covenant contained in the deed. The covenant is, "that the Legislature of the State of Georgia, at the time of passing the Act of Sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said Act." The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the Constitution of the State of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that State. It then sets forth the granting Act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the Act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the Legislature of Georgia, unless restrained by its own Constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then Constitution of the State of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its Acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the Constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the Act of 1795. They cannot say that, in passing that Act, the legislature has transcended its powers, and violated the Constitution.

In overruling the demurrer, therefore, to the first plea, the Circuit Court committed no error.

The third covenant is, that all the title which the State of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The second count assigns, in substance, as a breach of this covenant, that the original grantees from the State of Georgia promised and assured divers members of the legislature, then sitting in general as-

sembly, that if the said members would assent to, and vote for, the passing of the Act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said State by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, &c., and so the title of the State of Georgia did not pass to the said Peck, &c.

The plea to this count, after protesting that the promises it allèges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the Legislature of the State of Georgia.

To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an Act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the Act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the State of Georgia to annul the contract, nor does it appear to the court, by this count, that the State of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law which constituted the contract, by being promised an interest in it, and that therefore the Act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative Act, which the legislature might constitutionally pass, if the Act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the Act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The Circuit Court, therefore, did right in overruling this demurrer.

The fourth covenant in the deed is, that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent Act of any subsequent legislature of the State of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent legislature passed an Act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the State to the lands it contained. The count proceeds to recite at large this rescinding Act, and concludes with averring that, by reason of this Act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting as before that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions presented by these pleadings, are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the Governor, made in pursuance of an Act of Assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with

fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the Legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the Act be valid, has annihilated their rights also.

The Legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

It is, however, to be recollected that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the Legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decisions should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.

A Court of Chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by

improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its Act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the Legislature of Georgia, or of its Acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding Act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own Act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well-known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any Act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an Act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights

have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding Act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States, which none claim a right to pass. The Constitution of the United States declares that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the Constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and

those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the Constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.

No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter?

The State legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seised for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power

of seising, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making that distinction. This rescinding Act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a principle originally engrafted in that instrument, though no longer a part of it. The Constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract, was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the State had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a State is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the third plea, therefore, there is no error. . . .

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate States, was a momentous question, which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the State of Georgia, and that the State of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a State can be seised in fee of lands subject to the Indian title, and whether a decision that they were seised in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.



The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State.

*Judgment affirmed, with costs.*

[The opinion of JOHNSON, J., is omitted.]

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MARTIN, HEIR AT LAW AND DEVISEE OF FAIRFAX, v. HUNTER'S LESSEE.

SUPREME COURT OF THE UNITED STATES. 1816.

[1 *Wheaton*, 304 ; 3 *Curtis's Decisions*, 562.]

THIS case is fully stated in the opinion of the court.

*Jones*, for the plaintiff in error.

*Tucker and Dexter*, for the defendant.

STORY, J., delivered the opinion of the court.

This is a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February Term, 1813, to be carried into due execution. The following is the judgment of the Court of Appeals rendered on the mandate: "The court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the Act of Congress to establish the Judicial Courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that Act; that the proceedings thereon in the Supreme Court were *coram non judice*, in relation to this court, and that obedience to its mandate be declined by the court."

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the Bar.

The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the States the exercise of any powers which were,

in their judgment, incompatible with the objects of the general compact ; to make the powers of the State governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in State institutions, for the powers of the States depend upon their own constitutions ; and the people of every State had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the State governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the Constitution, which declares that " the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms ; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The Constitution, unavoidably, deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter ; and restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the inter-

pretation of the Constitution, so far as regards the great points in controversy.

The third article of the Constitution is that which must principally attract our attention. . . .

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over State tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases before mentioned the Supreme Court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclusive of State tribunals. How otherwise could the jurisdiction extend to all cases arising under the Constitution, laws, and treaties of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by State tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If State tribunals might exercise concurrent jurisdiction over all or

some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States, might, as to such cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus fœderis* should arise directly, but when it should arise, incidentally, in cases pending in State courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any Act of Congress.

On the other hand, if, as has been contended, a discretion be vested in Congress to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the State courts. Under such circumstances, it must be held that the appellate power would extend to State courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the State courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution, or laws of any State to the contrary notwithstanding." It is obvious that this obligation is imperative upon the State judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the Constitution, laws, and treaties of the United States, "the supreme law of the land."

A moment's consideration will show us the necessity and propriety, of this provision in cases where the jurisdiction of the State courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same State, and performance thereof is sought in the courts of that State; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose, at the trial, the defendant sets up in his defence a tender under a State law, making paper money a good tender, or a State law, impairing the obligation of such contract, which law, if binding, would

defeat the suit. The Constitution of the United States has declared that no State shall make anything but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If Congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the State court proceed to hear and determine it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a State court, and the defendant should allege in his defence that the crime was created by an *ex post facto* Act of the State, must not the State court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the State courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before State tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, State courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the State courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to State tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution.

It has been argued that such an appellate jurisdiction over State courts is inconsistent with the genius of our governments, and the spirit of the Constitution. That the latter was never designed to act upon State sovereignties, but only upon the people, and that, if the power exists, it will materially impair the sovereignty of the States, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon States, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon

the States. Surely, when such essential portions of State sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the States. The language of the Constitution is also imperative upon the States, as to the performance of many duties. It is imperative upon the State legislatures to make laws prescribing the time, places, and manner of holding elections for Senators and representatives, and for electors of President and Vice-President. And in these, as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by State legislatures. When, therefore, the States are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the States are, in some respects, under the control of Congress, and in every case are, under the Constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of State courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of State judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of State sovereignty.

The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power, a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior, or appellate court must pronounce the final judgment; and common-sense, as well as legal reasoning, has conferred it upon the latter.

It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to State rights and State jeal-

ousies, a power was given to Congress, to establish "courts for revising and determining, finally, appeals in all cases of captures." It is remarkable, that no power was given to entertain original jurisdiction in such cases; and, consequently, the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of State tribunals. This was, undoubtedly, so far a surrender of State sovereignty; but it never was supposed to be a power fraught with public danger, or destructive of the independence of State judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromised, and our national peace be endangered. Under the present Constitution the prize jurisdiction is confined to the courts of the United States; and a power to revise the decisions of State courts, if they should assert jurisdiction over prize causes, cannot be less important, or less useful, than it was under the confederation.

In this connection, we are led again to the construction of the words of the Constitution, "the judicial power shall extend," &c. If, as has been contended at the Bar, the term "extend" have a relative signification, and mean to widen an existing power, it will then follow, that, as the confederation gave an appellate power over State tribunals, the Constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the courts of the United States. It is not presumed that the learned counsel would choose to adopt such a conclusion.

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because State judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judicial power, from the State courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason — admitting that the judges of the State courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that State attachments, State prejudices, State jealousies, and State interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between States; between citizens of different States; between citizens claiming grants under different States; between a State and its citizens, or foreigners, and between citizens and foreigners,

it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the State courts. In respect to the other enumerated cases — the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction — reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the State court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted Congress possess to remove suits from State courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication,



as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied, by the legislature, to interlocutory as well as final judgments. And if the right of removal from State courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in State courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of State tribunals.

The remedy, too, of removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only on the parties, and not upon the State courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and, in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If State courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the State decisions would be paramount to the Constitution; and though in civil suits the courts of the United States might act upon the parties, yet the State courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the State courts; and that the 25th section of the Judiciary Act, which authorizes the

exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts. . . .

It is the opinion of the whole court, that the judgment of the Court of Appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the District Court, held at Winchester, be, and the same is hereby affirmed. [The concurring opinion of JOHNSON, J., is omitted.]<sup>1</sup>

<sup>1</sup> The same point was enforced in 1821, on a writ of error to a Virginia court in a criminal case. *Cohens v. Va.* 6 Wheat. 264 (1821). It was also elaborately considered and decided in *Ableman v. Booth*, 21 How. 506 (1858). — ED.

## EAKIN v. RAUB.

SUPREME COURT OF PENNSYLVANIA. 1825.

[12 S. &amp; R. 330.]

WRIT of error to the Court of Common Pleas of Northampton County, in an action of ejectment brought by James Eakin and James and Ann Simpson, against Daniel Raub, Edmund Porter, Samuel Sitgreaves, Hugh Ross, John Lippens, and John Ross, to recover a moiety of certain lots in the borough of Easton. . . . [The question was on the operation of two statutes of limitation. The judgment below was reversed by the majority of the court (TILGHMAN, C. J. and DUNCAN, J.) on the ground that, "The Act of the 11th of March, 1815, is not to be construed so as to form an immediate bar, by retrospection, to the claims of persons beyond sea, who had been out of possession twenty-one years prior to the passing of the Act; but such persons were allowed fifteen years from the 11th of March, 1815, for bringing their actions according to the provisions of the 3d section of the Act of Limitations of the 26th of March, 1785." MR. JUSTICE GIBSON, in a dissenting opinion, adopted a different construction of the statute.]

*Barnes*, for the plaintiffs in error. *Scott and Binney*, for the defendants in error.

GIBSON, J. . . . But it is said, that without it, the latter Act would be unconstitutional; and, instead of controverting this, I will avail myself of it to express an opinion which I have deliberately formed, on the abstract right of the judiciary to declare an unconstitutional Act of the Legislature void.

It seems to me there is a plain difference, hitherto unnoticed, between Acts that are repugnant to the Constitution of the particular State, and Acts that are repugnant to the Constitution of the United States; my opinion being, that the judiciary is bound to execute the former, but not the latter. I shall hereafter attempt to explain this difference, by pointing out the particular provisions in the Constitution of the United States on which it depends. I am aware, that a right to declare all unconstitutional Acts void, without distinction as to either Constitution, is generally held as a professional dogma; but, I apprehend, rather as a matter of faith than of reason. I admit that I once embraced the same doctrine, but without examination, and I shall therefore state the arguments that impelled me to abandon it, with great respect for those by whom it is still maintained. But I may premise, that it is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall (in *Marbury v. Madison*, 1 Cranch, 176), and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend. *Si Per-*

*gama dextra defendi potuit, etiam hac defensa fuisset.* In saying this, I do not overlook the opinion of Judge Patterson, in *Vanhorne v. Dorrance*, 2 Dall. 307, which abounds with beautiful figures in illustration of his doctrine; but, without intending disrespect, I submit that metaphorical illustration is one thing and argument another. Now, in questions of this sort, precedents ought to go for absolutely nothing. The Constitution is a collection of fundamental laws, not to be departed from in practice nor altered by judicial decision, and in the construction of it, nothing would be so alarming as the doctrine of *communis error*, which offers a ready justification for every usurpation that has not been resisted in *limine*. Instead, therefore, of resting on the fact, that the right in question has universally been assumed by the American courts, the judge who asserts it ought to be prepared to maintain it on the principles of the Constitution.

I begin, then, by observing that in this country, the powers of the judiciary are divisible into those that are political and those that are purely civil. Every power by which one organ of the government is enabled to control another, or to exert an influence over its Acts, is a political power. The political powers of the judiciary are extraordinary and adventitious; such, for instance, as are derived from certain peculiar provisions in the Constitution of the United States, of which hereafter: and they are derived, by direct grant, from the common fountain of all political power. On the other hand, its civil are its ordinary and appropriate powers; being part of its essence, and existing independently of any supposed grant in the Constitution. But where the government exists by virtue of a written constitution, the judiciary does not necessarily derive, from that circumstance, any other than its ordinary and appropriate powers. Our judiciary is constructed on the principles of the common law, which enters so essentially into the composition of our social institutions as to be inseparable from them, and to be, in fact, the basis of the whole scheme of our civil and political liberty. In adopting any organ or instrument of the common law, we take it with just such powers and capacities as were incident to it at the common law, except where these are expressly, or by necessary implication, abridged or enlarged in the Act of adoption; and, that such Act is a written instrument, cannot vary its consequences or construction. In the absence of special provision to the contrary, sheriffs, justices of the peace, and other officers whose offices are established in the Constitution, exercise no other powers here, than what similar officers do in England; and trial by jury would have been according to the course of the common law, without any declaration to that effect in the Constitution. Now, what are the powers of the judiciary at the common law? They are those that necessarily arise out of its immediate business; and they are therefore commensurate only with the judicial execution of the municipal law, or, in other words, with the administration of distributive justice, without extending to anything of a political cast whatever. Dr. Paley, as able a man as ever wrote

on those subjects on which he professed to treat, seems to have considered the judiciary as a part of the executive, and judging from its essence, subordinate to the legislature, which he viewed as the depository of the whole sovereignty of the State. With us, although the legislature be the depository of only so much of the sovereignty as the people have thought fit to impart, it is nevertheless sovereign within the limit of its powers, and may relatively claim the same pre-eminence here that it may claim elsewhere. It will be conceded, then, that the ordinary and essential powers of the judiciary do not extend to the annulling of an Act of the Legislature. Nor can the inference to be drawn from this, be evaded by saying that in England the Constitution, resting in principles consecrated by time, and not in an actual written compact, and being subject to alteration by the very Act of the Legislature, there is consequently no separate and distinct criterion by which the question of constitutionality may be determined; for it does not follow, that because we have such a criterion, the application of it belongs to the judiciary. I take it, therefore, that the power in question does not necessarily arise from the judiciary being established by a written constitution, but that this organ can claim, on account of that circumstance, no powers that do not belong to it at the common law; and that, whatever may have been the cause of the limitation of its jurisdiction originally, it can exercise no power of supervision over the legislature, without producing a direct authority for it in the Constitution, either in terms or by irresistible implication from the nature of the government: without which the power must be considered as reserved, along with the other ungranted portions of the sovereignty for the immediate use of the people.

The Constitution of Pennsylvania contains no express grant of political powers to the judiciary. But, to establish a grant by implication, the Constitution is said to be a law of superior obligation; and, consequently, that if it were to come into collision with an Act of the Legislature, the latter would have to give way. This is conceded. But it is a fallacy, to suppose that they can come into collision, before the judiciary. What is a constitution? It is an Act of extraordinary legislation, by which the people establish the structure and mechanism of their government; and in which they prescribe fundamental rules to regulate the motion of the several parts. What is a statute? It is an Act of ordinary legislation, by the appropriate organ of the government; the provisions of which are to be executed by the executive or judiciary, or by officers subordinate to them. The Constitution, then, contains no practical rules for the administration of distributive justice, with which alone the judiciary has to do; these being furnished in acts of ordinary legislation, by that organ of the government, which, in this respect, is exclusively the representative of the people; and it is generally true, that the provisions of a constitution are to be carried into effect immediately by the legislature, and only mediately, if at all, by the judiciary. In what respect is the Constitution of Pennsylvania

inconsistent with this principle? Only, perhaps, in one particular provision, to regulate the style of process, and establish an appropriate form of conclusion in criminal prosecutions: in this alone the Constitution furnishes a rule for the judiciary, and this the legislature cannot alter, because it cannot alter the Constitution. In all other cases, if the Act of Assembly supposed to be unconstitutional, were laid out of the question, there would remain no rule to determine the point in controversy in the cause, but the statute or common law, as it existed before the Act of Assembly was passed; and the Constitution and Act of Assembly therefore do not furnish conflicting rules applicable to the point before the court; nor is it at all necessary, that the one or the other of them should give way.

The Constitution and the right of the legislature to pass the Act, may be in collision. But is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ, to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the Constitution are we to look for this proud pre-eminence? Viewing the matter in the opposite direction, what would be thought of an Act of Assembly in which it should be declared that the Supreme Court had, in a particular case, put a wrong construction on the Constitution of the United States, and that the judgment should therefore be reversed? It would doubtless be thought a usurpation of judicial power. But it is by no means clear, that to declare a law void which has been enacted according to the forms prescribed in the Constitution, is not a usurpation of legislative power. It is an act of sovereignty; and sovereignty and legislative power are said by Sir William Blackstone to be convertible terms. It is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the Constitution. So that to affirm that the judiciary has a right to judge of the existence of such collision, is to take for granted the very thing to be proved. And, that a very cogent argument may be made in this way, I am not disposed to deny; for no conclusions are so strong as those that are drawn from the *petitio principii*.

But it has been said to be emphatically the business of the judiciary, to ascertain and pronounce what the law is; and that this necessarily involves a consideration of the Constitution. It does so: but how far? If the judiciary will inquire into anything beside the form of enactment, where shall it stop? There must be some point of limitation to such an inquiry; for no one will pretend, that a judge would be justifiable in calling for the election returns, or scrutinizing the qualifications of those who composed the legislature.

It is next supposed, that as the members of the legislature have no inherent right of legislation, but derive their authority from the people, no law can be valid where authority to pass it, is either simply not given or positively withheld: thus treating the members as the agents of the people, and the Constitution as a letter of attorney containing

their authority and bounding their sphere of action, and the consequence deduced being, that acts not warranted by the Constitution are not the acts of the people, but of those that do them; and that they are therefore *ipso facto* void. The concluding inference is, in military phrase, the key of the position, and if it be tenable, it will decide the controversy; for a law *ipso facto* void, is absolutely a *non entity*. But it is putting the argument on bold ground to say, that a high public functionary shall challenge no more respect than is due to a private individual; and that its acts, although presenting themselves under sanctions derived from a strict observance of the form of enactment prescribed in the Constitution, are to be rejected as *ipso facto* void for excess of authority. The Constitution is not to be expounded like a deed, but by principles of interpretation much more liberal; as was declared by this court, in *The Farmers and Mechanics' Bank v. Smith*, 3 Serg. & Rawle, 63. But, in the case of a public functionary, even according to common-law maxims, *omnia presumi debeant rite et solemniter esse acta*. The benefit of this maxim cannot be refused to the legislature by those who advocate the other side, inasmuch as it is the foundation of their own hypothesis; for all respect is demanded for the acts of the judiciary. For instance: let it be supposed that the power to declare a law unconstitutional has been exercised. What is to be done? The legislature must acquiesce, although it may think the construction of the judiciary wrong. But why must it acquiesce? Only because it is bound to pay that respect to every other organ of the government, which it has a right to exact from each of them in turn. This is the argument. But it will not be pretended, that the legislature has not at least an equal right with the judiciary to put a construction on the Constitution; nor that either of them is infallible; nor that either ought to be required to surrender its judgment to the other. Suppose, then, they differ in opinion as to the constitutionality of a particular law; if the organ whose business it first is to decide on the subject, is not to have its judgment treated with respect, what shall prevent it from securing the preponderance of its opinion by the strong arm of power? It is in vain to say, the legislature would be the aggressor in this; and that no argument in favor of its authority can be drawn from an abuse of its power. Granting this, yet it is fair to infer, that the framers of the Constitution never intended to force the judges either to become martyrs or to flinch from their duty; or to interpose a check that would produce no other effect than an intestine war. Such things have occurred in other States, and would necessarily occur in this, under circumstances of strong excitement in the popular branch. The judges would be legislated out of office, if the majority requisite to a direct removal by impeachment, or the legislative address, could not be had; and this check, instead of producing the salutary effect expected from it, would rend the government in pieces. But, suppose that a struggle would not produce consequences so disastrous, still the soundness of any construction which would bring one organ of the govern-

ment into collision with another, is to be more than suspected; for where collision occurs, it is evident the machine is working in a way the framers of it did not intend. But what I want more immediately to press on the attention, is the necessity of yielding to the acts of the legislature the same respect that is claimed for the acts of the judiciary. Repugnance to the Constitution is not always self-evident; for questions involving the consideration of its existence, require for their solution the most vigorous exertion of the higher faculties of the mind, and conflicts will be inevitable, if any branch is to apply the Constitution after its own fashion to the acts of all the others. I take it, then, the legislature is entitled to all the deference that is due to the judiciary; that its acts are in no case to be treated as *ipso facto* void, except where they would produce a revolution in the government; and that, to avoid them, requires the act of some tribunal competent under the Constitution (if any such there be), to pass on their validity. All that remains, therefore, is to inquire whether the judiciary or the people are that tribunal.

Now, as the judiciary is not expressly constituted for that purpose, it must derive whatever authority of the sort it may possess, from the reasonableness and fitness of the thing. But, in theory, all the organs of the government are of equal capacity; or, if not equal, each must be supposed to have superior capacity only for those things which peculiarly belong to it; and, as legislation peculiarly involves the consideration of those limitations which are put on the law-making power, and the interpretation of the laws when made, involves only the construction of the laws themselves, it follows that the construction of the Constitution in this particular belongs to the legislature, which ought therefore to be taken to have superior capacity to judge of the constitutionality of its own acts. But suppose all to be of equal capacity in every respect, why should one exercise a controlling power over the rest? That the judiciary is of superior rank, has never been pretended, although it has been said to be co-ordinate. It is not easy, however, to comprehend how the power which gives law to all the rest, can be of no more than equal rank with one which receives it, and is answerable to the former for the observance of its statutes. Legislation is essentially an act of sovereign power; but the execution of the laws by instruments that are governed by prescribed rules and exercise no power of volition, is essentially otherwise. The very definition of law, which is said to be "a rule of civil conduct prescribed by the supreme power in the State," shows the intrinsic superiority of the legislature. It may be said, the power of the legislature, also, is limited by prescribed rules. It is so. But it is, nevertheless, the power of the people, and sovereign as far as it extends. It cannot be said, that the judiciary is co-ordinate merely because it is established by the Constitution. If that were sufficient, sheriffs, registers of wills, and recorders of deeds, would be so too. Within the pale of their authority, the acts of these officers will have the power of the people for their support; but no one will pretend,



they are of equal dignity with the acts of the legislature. Inequality of rank arises not from the manner in which the organ has been constituted, but from its essence and the nature of its functions; and the legislative organ is superior to every other, inasmuch as the power to will and to command, is essentially superior to the power to act and to obey. It does not follow, then, that every organ created by special provision in the Constitution, is of equal rank. Both the executive, strictly as such, and the judiciary are subordinate; and an act of superior power exercised by an inferior ought, one would think, to rest on something more solid than implication.

It may be alleged, that no such power is claimed, and that the judiciary does no positive act, but merely refuses to be instrumental in giving effect to an unconstitutional law. This is nothing more than a repetition in a different form of the argument, — that an unconstitutional law is *ipso facto* void; for a refusal to act under the law, must be founded on a right in each branch to judge of the acts of all the others, before it is bound to exercise its functions to give those acts effect. No such right is recognized in the different branches of the national government, except the judiciary (and that, too, on account of the peculiar provisions of the Constitution), for it is now universally held, whatever doubts may have once existed, that Congress is bound to provide for carrying a treaty into effect, although it may disapprove of the exercise of the treaty-making power in the particular instance. A government constructed on any other principle, would be in perpetual danger of standing still; for the right to decide on the constitutionality of the laws, would not be peculiar to the judiciary, but would equally reside in the person of every officer whose agency might be necessary to carry them into execution.

Every one knows how seldom men think exactly alike on ordinary subjects; and a government constructed on the principle of assent by all its parts, would be inadequate to the most simple operations. The notion of a complication of counter checks has been carried to an extent in theory, of which the framers of the Constitution never dreamt. When the entire sovereignty was separated into its elementary parts, and distributed to the appropriate branches, all things incident to the exercise of its powers were committed to each branch exclusively. The negative which each part of the legislature may exercise, in regard to the acts of the other, was thought sufficient to prevent material infractions of the restraints which were put on the power of the whole; for, had it been intended to interpose the judiciary as an additional barrier, the matter would surely not have been left in doubt. The judges would not have been left to stand on the insecure and ever shifting ground of public opinion as to constructive powers: they would have been placed on the impregnable ground of an express grant. They would not have been compelled to resort to the debates in the convention, or the opinion that was generally entertained at the time. A constitution, or a statute, is supposed to contain the whole will of

the body from which it emanated; and I would just as soon resort to the debates in the legislature for the construction of an Act of Assembly, as to the debates in the convention for the construction of the Constitution.

The power is said to be restricted to cases that are free from doubt or difficulty. But the abstract existence of a power cannot depend on the clearness or obscurity of the case in which it is to be exercised; for that is a consideration that cannot present itself, before the question of the existence of the power shall have been determined; and, if its existence be conceded, no considerations of policy arising from the obscurity of the particular case, ought to influence the exercise of it. The judge would have no discretion; but the party submitting the question of constitutionality would have an interest in the decision of it, which could not be postponed to motives of deference for the opinion of the legislature. His rights would depend not on the greatness of the supposed discrepancy with the Constitution, but on the existence of any discrepancy at all; and the judge would therefore be bound to decide this question, like every other in respect to which he may be unable to arrive at a perfectly satisfactory conclusion. But he would evade the question instead of deciding it, were he to refuse to decide in accordance with the inclination of his mind. To say, therefore, that the power is to be exercised but in perfectly clear cases, is to betray a doubt of the propriety of exercising it at all. Were the same caution used in judging of the existence of the power that is inculcated as to the exercise of it, the profession would perhaps arrive at a different conclusion. The grant of a power so extraordinary ought to appear so plain, that he who should run might read. Now, put the Constitution into the hands of any man of plain sense, whose mind is free from an impression on the subject, and it will be impossible to persuade him, that the exercise of such a power was ever contemplated by the convention.

But the judges are sworn to support the Constitution, and are they not bound by it as the law of the land? In some respects they are. In the very few cases in which the judiciary, and not the legislature, is the immediate organ to execute its provisions, they are bound by it in preference to any Act of Assembly to the contrary. In such cases, the Constitution is a rule to the courts. But what I have in view in this inquiry, is the supposed right of the judiciary to interfere, in cases where the Constitution is to be carried into effect through the instrumentality of the legislature, and where that organ must necessarily first decide on the constitutionality of its own act. The oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty: otherwise it were difficult to determine what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the

Constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still it must be understood in reference to supporting the Constitution, only as far as that may be involved in his official duty; and, consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath. It is worthy of remark here, that the foundation of every argument in favor of the right of the judiciary, is found at last to be an assumption of the whole ground in dispute. Granting that the object of the oath is to secure a support of the Constitution in the discharge of official duty, its terms may be satisfied by restraining it to official duty in the exercise of the ordinary judicial powers. Thus, the Constitution may furnish a rule of construction, where a particular interpretation of a law would conflict with some constitutional principle; and such interpretation, where it may, is always to be avoided. But the oath was more probably designed to secure the powers of each of the different branches from being usurped by any of the rest: for instance, to prevent the House of Representatives from erecting itself into a court of judicature, or the Supreme Court from attempting to control the legislature; and, in this view, the oath furnishes an argument equally plausible against the right of the judiciary. But if it require a support of the Constitution in anything beside official duty, it is in fact an oath of allegiance to a particular form of government; and, considered as such, it is not easy to see why it should not be taken by the citizens at large, as well as by the officers of the government. It has never been thought that an officer is under greater restraint as to measures which have for their avowed end a total change of the Constitution, than a citizen who has taken no oath at all. The official oath, then, relates only to the official conduct of the officer, and does not prove that he ought to stray from the path of his ordinary business to search for violations of duty in the business of others; nor does it, as supposed, define the powers of the officer.

But do not the judges do a positive act in violation of the Constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the Constitution. The fallacy of the question is, in supposing that the judiciary adopts the Acts of the Legislature as its own; whereas the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the Constitution which may be the consequence of the enactment. The fault is imputable to the legislature, and on it the responsibility exclusively rests. In this respect, the judges are in the predicament of jurors who are bound to serve in capital cases, although unable, under any circumstances, to reconcile it to their duty to deprive a human being of life. To one of these, who applied to be discharged from the panel, I once heard it remarked, by an eminent and humane judge, "You do not deprive a prisoner of life by finding him guilty of a cap-

ital crime : you but pronounce his case to be within the law, and it is therefore those who declare the law, and not you, who deprive him of life."

That everything addressed to the legislature by way of positive command, is purely directory, will hardly be disputed : it is only to enforce prohibitions that the interposition of judicial authority is thought to be warrantable. But I can see no room for a distinction between the injunctions that are positive and those that are negative : the same authority must enforce both.

But it has been said, that this construction would deprive the citizen of the advantages which are peculiar to a written constitution, by at once declaring the power of the legislature, in practice, to be illimitable. I ask, what are those advantages? The principles of a written constitution are more fixed and certain, and more apparent to the apprehension of the people, than principles which depend on tradition and the vague comprehension of the individuals who compose the nation, and who cannot all be expected to receive the same impressions or entertain the same notions on any given subject. But there is no magic or inherent power in parchment and ink, to command respect and protect principles from violation. In the business of government, a recurrence to first principles answers the end of an observation at sea with a view to correct the dead reckoning ; and, for this purpose, a written constitution is an instrument of inestimable value. It is of inestimable value, also, in rendering its principles familiar to the mass of the people ; for, after all, there is no effectual guard against legislative usurpation but public opinion, the force of which, in this country, is inconceivably great. Happily this is proved, by experience, to be a sufficient guard against palpable infractions. The Constitution of this State has withstood the shocks of strong party excitement for thirty years, during which no Act of the Legislature has been declared unconstitutional, although the judiciary has constantly asserted a right to do so in clear cases. But it would be absurd to say, that this remarkable observance of the Constitution has been produced, not by the responsibility of the legislature to the people, but by an apprehension of control by the judiciary. Once let public opinion be so corrupt as to sanction every misconstruction of the Constitution and abuse of power which the temptation of the moment may dictate, and the party which may happen to be predominant, will laugh at the puny efforts of a dependent power to arrest it in its course.

For these reasons, I am of opinion that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious Act. What is wanting to plenary power in the government, is reserved by the people for their own immediate use ; and to redress an infringement of their rights in this respect, would seem to be an accessory of the power thus reserved. It might, perhaps, have been better to vest the power in the judiciary ; as it might be expected that its habits of

deliberation, and the aid derived from the arguments of counsel, would more frequently lead to accurate conclusions. On the other hand, the judiciary is not infallible; and an error by it would admit of no remedy but a more distinct expression of the public will, through the extraordinary medium of a convention; whereas, an error by the legislature admits of a remedy by an exertion of the same will, in the ordinary exercise of the right of suffrage,—a mode better calculated to attain the end, without popular excitement. It may be said, the people would probably not notice an error of their representatives. But they would as probably do so, as notice an error of the judiciary; and, beside, it is a postulate in the theory of our government, and the very basis of the superstructure, that the people are wise, virtuous, and competent to manage their own affairs: and if they are not so, in fact, still every question of this sort must be determined according to the principles of the Constitution, as it came from the hands of its framers, and the existence of a defect which was not foreseen, would not justify those who administer the government, in applying a corrective in practice, which can be provided only by a convention. Long and uninterrupted usage is entitled to respect; and, although it cannot change an admitted principle of the Constitution, it will go far to settle a question of doubtful right. But, although this power has all along been claimed by the State judiciary, it has never been exercised. *Austin v. The University of Pennsylvania*, 1 Yeates, 260, is the only case even apparently to the contrary; but there the Act of Assembly had been previously repealed. In *Vanhorne v. Dorrance*, decided by the Circuit Court of the United States under similar circumstances, the right is peremptorily asserted and examples of monstrous violations of the Constitution are put in a strong light by way of example; such as taking away the trial by jury, the elective franchise, or subverting religious liberty. But any of these would be such a usurpation of the political rights of the citizens, as would work a change in the very structure of the government; or, to speak more properly, it would itself be a revolution, which, to counteract, would justify even insurrection; consequently, a judge might lawfully employ every instrument of official resistance within his reach. By this I mean, that while the citizen should resist with pike and gun, the judge might co-operate with *habeas corpus* and *mandamus*. It would be his duty, as a citizen, to throw himself into the breach, and, if it should be necessary, perish there; but this is far from proving the judiciary to be a peculiar organ under the Constitution, to prevent legislative encroachment on the powers reserved by the people; and this is all that I contend it is not. Indeed, its absolute inadequacy to the object, is conclusive that it never was intended as such by the framers of the Constitution, who must have had in view the probable operation of the government in practice.

But in regard to an Act of Assembly, which is found to be in collision with the Constitution, laws, or treaties of the United States, I take the

duty of the judiciary to be exactly the reverse. By becoming parties to the Federal Constitution, the States have agreed to several limitations of their individual sovereignty, to enforce which, it was thought to be absolutely necessary to prevent them from giving effect to laws in violation of those limitations, through the instrumentality of their own judges. Accordingly, it is declared in the sixth article and second section of the Federal Constitution, that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby: anything in the laws or Constitution of any State to the contrary notwithstanding."

This is an express grant of a political power, and it is conclusive to show that no law of inferior obligation, as every State law must necessarily be, can be executed at the expense of the Constitution, laws, or treaties of the United States. It may be said, these are to furnish a rule only when there is no State provision on the subject. But, in that view, they could with no propriety be called supreme; for supremacy is a relative term, and cannot be predicated of a thing which exists separately and alone: and this law, which is called supreme, would change its character and become subordinate as soon as it should be found in conflict with a State law. But the judges are to be bound by the Federal Constitution and laws, notwithstanding anything in the Constitution or laws of the particular State to the contrary. If, then, a State were to declare the laws of the United States not to be obligatory on her judges, such an Act would unquestionably be void; for it will not be pretended, that any member of the Union can dispense with the obligation of the Federal Constitution: and, if it cannot be done directly, and by a general declaratory law, neither can it indirectly, and by by-laws dispensing with it in particular cases. This, therefore, is an express grant of the power, and would be sufficient for the purposes of the argument; but it is not all.

By the third article and second section, appellate jurisdiction of all cases arising under the Constitution and laws of the United States, is reserved to the Federal judiciary, under such regulations as Congress may prescribe; and, in execution of this provision, Congress has prescribed regulations for removing into the Supreme Court of the United States all causes decided by the highest court of judicature of any State, which involve the construction of the Constitution, or of any law or treaty of the United States. This is another guard against infraction of the limitations imposed on State sovereignty, and one which is extremely efficient in practice; for reversals of decisions in favor of the constitutionality of Acts of Assembly have been frequent on writs of error to the Supreme Court of the United States.

Now, a reversal implies that it was not only the right, but the duty of the inferior court to decide otherwise; for where there is but one

way of deciding, there can be no error. But what beneficial result would there be produced by the decision of a State court in favor of a State law palpably unconstitutional? The injured party would have the judgment reversed by the court in the last resort, and the cause would come back with a mandate to decide differently, which the State court dare not disobey: so that nothing would eventually be gained by the party claiming under the law of the State, but, on the contrary, he would be burdened with additional costs. I grant, however, that the State judiciary ought not to exercise the power except in cases free from all doubt, because, as a writ of error to the Supreme Court of the United States lies to correct an error only in favor of the constitutionality of the State law, an error in deciding against it would be irremediable. Anticipating those who think they perceive in this, exactly what I have censured in those who assume the existence of the same power in respect to laws that are repugnant to the Constitution of the State, but restrict the exercise of it to clear cases, I briefly remark that the instances are not parallel; an error in deciding against the validity of the law being irreparable in the one, and not so in the other.

Unless, then, the respective States are not bound by the engagement, which they have contracted by becoming parties to the Constitution of the United States, they are precluded from denying either the right or the duty of their judges, to declare their laws void when they are repugnant to that Constitution.

The preceding inquiry may perhaps appear foreign to the point immediately before the court; but, as the Act of 1815 may be thought repugnant to the Constitution of the State, an examination of the powers of the judiciary became not only proper but necessary.

Then, laying the Constitution of the State out of the case, what restriction on State sovereignty is violated by at once repealing any of the saving clauses in the Statute of Limitations? Those restrictions are contained in the first article and tenth section of the Constitution of the United States; and, as there is no pretence that a contract has been impaired, none of them can, even by the most strained construction, be supposed to be violated, except that which relates to *ex post facto* laws. But that was held, in *Calder v. Bull*, 3 Dall. 386, to be applicable only to penal laws. The law in question not only relates to civil rights, but is not even retrospective. . . . I am therefore of opinion that the judgment be affirmed.<sup>1</sup>

<sup>1</sup> When this opinion was cited, in argument, in 1845, Chief Justice Gibson remarked to counsel: "I have changed that opinion, for two reasons. The late convention [for framing the Pennsylvania Constitution of 1838], by their silence, sanctioned the pretensions of the courts to deal freely with the Acts of the Legislature; and from experience of the necessity of the case." *Norris v. Clymer*, 2 Penn. St. 281. — Ed.

NOTE.<sup>1</sup>

THE quotation from Bluntschli's Public Law, previously given,<sup>2</sup> is authority for the proposition that, in 1863, in Germany, no judicial court could declare a law of its State to be void because conflicting with the written constitution of the State. That proposition was in 1883, and is since, equally true of the judiciaries of the several States of the German Empire. Between those two dates, however, two most interesting cases have been decided, in the first of which the truth of the proposition was denied with great ability by the Hanseatic Court of Upper Appeal at Lubeck. In the second case, the doctrine of the first was overruled by the Imperial Tribunal or Supreme Court of the German Empire. Thus, with the exception of a temporary recognition within the limited territories of the Hanseatic republics, the proposition in question has always been law in the different States of Germany possessing written constitutions, that is to say, in nearly every German State.

The first case was decided in 1875. It is that of *Garbade v. The State of Bremen*, and is reported in Seuffert's Archives for the Decisions of the Highest Courts of the German States, vol. 32, no. 101. The following is a translation of the decision of the Hanseatic Court of Upper Appeal, there given in the original:

"Positive directions like that of Article 106 of the Prussian constitutional charter sometimes prohibit an official testing of the legal validity of ordinances [of the sovereign] which have been authenticated in due form. When such directions do not exist, the judge has, according to general legal principles, both the authority and the duty of refusing to apply an ordinance of the sovereign (*Landesherr*), which, while its provisions are those of a law, has not been enacted according to the forms prescribed for making laws by the Constitution of the land. For this purpose, the judge must, of course, first of all examine whether, when the law in question was published it was then explicitly stated that the constitutionally prescribed forms were observed. (See case in Kierulff's Collection, vol. 5, p. 331.) The proper decision in such a case, however, depends only upon the question as to what evidence is sufficient to put the judge in a position of ascertaining with certainty that the constitutional forms for making laws were complied with. The decision itself, therefore, takes for granted that the judge must have no doubt as to the observance of the constitutionally prescribed forms in making the law in question, and when the decision has shown a condition of things, which prevents any such doubt, it goes no farther.

"It is thus true that, in cases of laws which are not organic ones altering the Constitution, the judge must be sure that the law, which he is to apply, has been made according to constitutional forms. Such being so, it must be equally true that the same requirement must be met in the case of organic laws altering the Constitution, for, either a part or the whole of their provisions may enlarge or diminish existing rights as hitherto constituted. For the judge is as much bound by the organic constitutional law of the land as by any other law. If therefore the observance of certain forms is constitutionally prescribed for changing a constitutional charter, it can only be altered or abolished by observing those forms. An ordinary law exists until it is abolished by way of legislation according to the forms prescribed for the enacting of laws. So too, a constitution exists until it is abolished by way of organic legislation according to the forms prescribed for changing the Constitution. These points do not include a further and a different question as to what are the conditions under which the judge must feel convinced that the requisite forms for altering the Constitu-

<sup>1</sup> The first part of this note is taken from Coxe's *Jud. Power and Unconst. Legis.* 95-102. I am indebted to William M. Meigs, Esq., the editor of this valuable work of the late Brinton Coxe, of Philadelphia, for obtaining permission from the owners of the copyright, and from the publishers (Messrs. Kay and Bro.), to quote these pages. — Ed.

<sup>2</sup> Bluntschli, *Gen. Pub. Law* (ed. 1863), i. 550, 551.



tion have been observed. An answer to this question is not, however, necessary in the case before us.

"That case is as follows :

"A constitution has been made in Bremen, the 19th article of which reads :

"Property and other private rights are inviolable. Cession, surrender, or limitation of the same for the general good can only be required in the cases and forms prescribed by law and upon proper indemnification."

"A law has been enacted in Bremen which is an ordinance relating to rural communities dated 28 December, 1870. It conflicts with the said Constitution and is not an organic constitutional law. Its 15th section reads thus :

"All hitherto existing exemptions from communal taxes, so far as not based on Federal laws or State treaties, are abolished without indemnification."

"The last-named law has been enacted according to the forms prescribed for ordinary legislation and therefore ought to be binding upon the judge. Nevertheless, if the forms prescribed for ordinary legislation are not sufficient for legislation altering the Constitution, such an Act of ordinary legislation leaves the Constitution intact. The latter continues to exist and, as long as it does so, the judge must hold it to be an existing law. Hereby arises a conflict of legal provisions. On account of the inequality of the conflicting laws, this conflict cannot be settled upon the principle of *lex posterior derogat legi priori*. It can only be settled by an application of the doctrine that ordinary laws conflicting with organic constitutional laws cannot be enacted."

"The judge is to be considered competent to make this decision, even without any authority having been explicitly given him by any special law; because he is obliged to apply the laws and because the application of two existing laws, conflicting with each other, is an impossibility. The recognition of the legal principle, that the judge is not to apply a law conflicting with the Constitution, includes therefore no assertion of a superiority of the judge over the lawgiver. So doing is merely an acknowledgment of his authority, in an actual case of conflict, to apply that law, which general legal principles require to be applied. In cases of conflict between laws of the Empire and laws of the land, there exists a written legal provision for the settlement thereof. In the case of a conflict between laws, which are of different import but emanate from the legislative power of the same State, there enters the legal principle that ordinary laws must not conflict with the provisions of the organic constitutional law. It may, perhaps, be objected that, when the legislative authorities have under forms of ordinary legislation, enacted a law, which the judge deems to be in contradiction to the provisions of the Constitution, those authorities have themselves previously considered the question whether such a contradiction exists. Granting this, however, the resulting obligation of the judge, in such a case, does not extend beyond weighing carefully the reasons on both sides of the question in a way like that which he must follow in another and similar case. This other case is that in which he is compelled to declare, in opposition to the legislative authorities of a particular State, that a law made by them contradicts the laws of the Empire."

"Now the constitutional charter of Bremen, dated February 21, 1854, in its Article 67, establishes certain formalities, by observing which, alterations of the Constitution can alone be made. The observance of these formalities in enacting the law of December 28, 1870, would have been considered sufficient for the adoption of any law altering the Constitution. According to the documents before us, it can, however, by no means be admitted that this was done; there being no indication that, in the case of the law of December 28, 1870, anything other than an Act of ordinary legislation was in question. This being so, the result arrived at in the reasons given for the previous part of this judgment, including likewise the consequences deduced therefrom, directly follow as a matter of course."

In concluding this account of the judgment of the Hanseatic Court of Upper Appeal, it ought to be added that it seems probable that that tribunal was greatly influenced by the whole of Von Mohl's treatise on "Unconstitutional Laws" and especially by its pages 79 and 80. See his *Monographie ueber die rechtliche Bedeutung verfassungswidriger Gesetze* in his work entitled, *Staatsrecht, Voelkerrecht und Politik*

(Tuebingen, 1860), vol. 1, pp. 66-95. Von Mohl was undoubtedly influenced by American ideas and writings, as pages 69 and 71 of the above work prove. He expressly mentions the authors of the *Federalist*, Story and Kent. He does not name Marshall, but must have been influenced by his views. Elsewhere he expresses great admiration for the Chief Justice.

THE case of *Garbade v. The State of Bremen* was expressly overruled, some eight years later, by the Imperial Tribunal. This was done in the case of *K. v. The Dyke Board of Niedervieland*, which was also a Bremen case. It is reported in the *Decisions of the Reichsgericht in Civil Causes*, vol. 9, p. 233. From the original report the following is partially abstracted and partially translated.

The suit was originally brought in the Land Court of Bremen by K. and other interested parties against the Dyke Board of Niedervieland in the State of Bremen. Thence an appeal was taken to the Superior Land Court of Hamburg in second instance. Recourse in third and final instance was then had to the *Reichsgericht* or Supreme Court of the German Empire. The original plaintiffs, who were finally defendants, claimed that their well-acquired rights, as commoners of a swine pasture, had been violated by the Dyke Board proceeding under section 29 of the dyke ordinance of Bremen, a State of the German Empire. That ordinance was an Act of ordinary legislation and its section 29 was alleged to be in conflict with the provisions of the written Constitution of Bremen, which prohibited legislation impairing well-acquired rights of property.

On behalf of K. and the other commoners it was contended, *inter alia*, that the said section of the dyke ordinance was an invalid law because it conflicted with the Constitution as aforesaid. All the questions raised in the case were decided in favor of the Dyke Board. The constitutional questions are, however, the only ones requiring mention here. The following extracts are translated from the portion of the decision, which relates to the constitutional branch of the case. This final judgment in third instance was given on February 17, 1883. In it the Court of Second Instance is alluded to as the Court of Appeal:

"The principle is maintained by the Court of Appeal that, when two interpretations of a law appear possible to a judge, one conflicting and the other not conflicting with the Constitution, the former is simply to be rejected: and this is laid down universally and without limitation (as is indicated by the court's use of the words *schon deshalb*). So laid down, this principle cannot be recognized as correct.

"When both the form of a law and the procedure of its enactment are not those prescribed for an alteration of the [written] Constitution, it may happen that a particular interpretation thereof may according to the judge's view be in conflict with a principle of the Constitution. Properly, this circumstance must be considered only one of the reasons determining the interpretation of the law. It can only be a decisive one when, exclusive of it, the grounds for one or other of the two contradicting interpretations are equally balanced. The Court of Appeal contented itself with mentioning that the interpretation given in first instance by the Land Court to section 29 of the dyke ordinance was not one of actual necessity, although its view of the constitutional repugnancy of the section was based upon that interpretation. The Court of Appeal, therefore, attributed too great weight and significance to the interpretation made by the Land Court, while not holding the same merely in itself to be fully satisfactory. In so doing, the Court of Appeal overlooked weighty considerations, proper in seeking to ascertain the legislative will. Among these was, especially, that of the question as to what was the purpose of the law, and what value according thereto one interpretation had when compared with the other. The omission to consider that question further involved the loss of an available means of assistance which would otherwise have been obtainable.

"... There remains to be considered only the question left undecided by the Appellate Court, namely, whether section 29 of the dyke ordinance shall be denied the force of binding law, because it is only an Act of ordinary legislation, while the Constitution is a law of a higher order. In a similar case, such denial was made by

the formerly existing Court of Upper Appeal at Lubeck. (See Seuffert's Archives, vol. 32, no. 101.<sup>1</sup>) This view, however, cannot be acceded to. On the contrary, the correct view on this head is that which was taken by the same court in another case only a few years before. (See Kierulff's Collection, vol. 7, p. 234.) This correct view is as follows: the constitutional provision that well-acquired rights must not be injured, is to be understood only as a rule for the legislative power itself to interpret, and does not signify that a command given by the legislative power should be left disregarded by the judge because it injures well-acquired rights. This is said without affecting the question whether the State may or may not be bound to grant damages; a matter not here brought into consideration. There is, therefore, no occasion to investigate whether well-acquired rights have been violated or not. The question is not whether a particular principle of the Constitution has been altered or not; but whether the law could have been enacted without an alteration of the Constitution itself, and therefore without applying the forms prescribed for such alteration. This last question, however, is one which cannot be examined by the judiciary." . . .

The case above mentioned in Kierulff's Collection, vol. 7, p. 234, is, that of *Krieger v. The State of Bremen*, decided by the Hanseatic Court of Upper Appeal on June 15, 1872. On the page cited, the court declares it to be law that the constitutional principle, which prohibits the injury of well-acquired rights by legislation, is to be understood only as a rule for the legislative power itself: that it does not signify that a command, which is given by the legislative power, is to be disregarded by the judiciary because it injures well-acquired rights. This is said with a saving as to whether the State may or may not be bound to grant remuneration for the injury. — COXE, *Jud. Power and Unconst. Legis.* 95-102.

So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which those departments are constitutionally authorized to take, or the determination of those departments that they are so authorized. It is enough, in confirmation of this, to refer to the fact that other countries, as France, Germany, and Switzerland, have written constitutions, and that such a power is not recognized there. "The restrictions," says Dicey, in his admirable *Law of the Constitution*, "placed on the action of the legislature under the French Constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the Constitution, and from the resulting support of public opinion."<sup>2</sup>

How came we then to adopt this remarkable practice? Mainly as a natural result of our political experience before the War of Independence, — as being colonists, governed under written charters of government proceeding from the English Crown. The terms and limitations of these charters, so many written constitutions, were enforced by various means, — by forfeiture of the charters, by Act of Parliament, by the direct annulling of legislation by the Crown, by judicial proceedings and an ultimate appeal to the Privy Council. Our practice was a natural result of this; but it was by no means a necessary one. All this colonial restraint was only the usual and normal

<sup>1</sup> The case of *Garbade v. The State of Bremen*, previously given.

<sup>2</sup> Ch. ii. p. 127, 3d ed. President Rogers, in the Preface to a valuable collection of papers on the "Constitutional History of the United States, as seen in the Development of American Law," 11, remarks that "there is not in Europe to this day a court with authority to pass on the constitutionality of national laws. But in Germany and Switzerland, while the Federal courts cannot annul a Federal law, they may, in either country, declare a cantonal or State law invalid when it conflicts with the Federal law." Compare Dicey, *ubi supra*, and Bryce, *Am. Com.*, i. 430, note (1st ed.), as to possible qualifications of this statement.

exercise of power. An external authority had imposed the terms of the charters, the authority of a paramount government, fully organized and equipped for every exigency of disobedience, with a king and legislature and courts of its own. The superior right and authority of this government were fundamental here, and fully recognized; and it was only a usual, orderly, necessary procedure when our own courts enforced the same rights that were enforced here by the Appellate Court in England. These charters were in the strict sense written *law*: as their restraints upon the colonial legislatures were enforced by the English court of last resort, so might they be enforced through the colonial courts, by disregarding as null what went counter to them.<sup>1</sup>

The Revolution came, and what happened then? Simply this: we cut the cord that tied us to Great Britain, and there was no longer an external sovereign. Our conception now was that "the people" took his place; that is to say, our own home population in the several States were now their own sovereign. So far as existing institutions were left untouched, they were construed by translating the name and style of the English sovereign into that of our new ruler,—ourselves, the People. After this the charters, and still more obviously the new constitutions, were not so many orders from without, backed by an organized outside government, which simply performed an ordinary function in enforcing them; they were precepts from the people themselves who were to be governed, addressed to each of their own number, and especially to those who were charged with the duty of conducting the government. No higher power existed to support these orders by compulsion of the ordinary sort. The sovereign himself, having written these expressions of his will, had retired into the clouds; in any regular course of events he had no organ to enforce his will, except those to whom his orders were addressed in these documents. How then should his written constitution be enforced if these agencies did not obey him, if they failed, or worked amiss?

Here was really a different problem from that which had been presented under the old state of things. And yet it happened that no new provisions were made to meet it. The old methods and the old conceptions were followed. In Connecticut, in 1776, by a mere legislative Act, the charter of 1662 was declared to continue "the civil Constitution of the State, under the sole authority of the people thereof, independent of any king or prince whatsoever;" and then two or three familiar fundamental rules of liberty and good government were added as a part of it. Under this the people of Connecticut lived till 1818. In Rhode Island the charter, unaltered, served their turn until 1842; and, as is well known, it was upon this that one of the early cases of judicial action arose for enforcing constitutional provisions under the new order of things, as against a legislative Act; namely, the case of *Trevett v. Weeden*, in the Rhode Island Supreme Court in 1786.<sup>2</sup>

But it is instructive to see that this new application of judicial power was not universally assented to. It was denied by several members of the Federal Convention, and was referred to as unsettled by various judges in the last two decades of the last century. The surprise of the Rhode Island Legislature at the action of the court in *Trevett v. Weeden* seems to indicate an impression in their minds that the change from colonial dependence to independence had made the legislature the substitute for Parliament, with a like omnipotence.<sup>3</sup> In Vermont it seems to have been the established doctrine of the period that the judiciary could not disregard a legislative Act; and the same view was held in Connecticut, as expressed in 1795 by Swift, afterwards Chief Justice of that State. In the preface to 1 D. Chipman's (Vermont) Reports, 22 *et seq.*, the learned reporter, writing (in 1824) of the period of the Vermont Constitution of 1777, says that "No idea was entertained that the judiciary had any power to inquire into the constitutionality of Acts of the Legislature, or to pronounce them void for any

<sup>1</sup> For the famous cases of *Lechmere v. Winthrop* (1727-28), *Phillips v. Savage* (1734), and *Clark v. Tousey* (1745), see the Talcott Papers, Conn. Hist. Soc. Coll. iv. 94, note.

<sup>2</sup> Varnum's Report (Providence, 1787); s. c. 2 Chandler's Crim. Trials, 269.

<sup>3</sup> And so of the excitement aroused by the alleged setting aside of a legislative Act in New York in 1784, in the case of *Rutgers v. Waddington*.

cause, or even to question their validity." And at page 25, speaking of the year 1785, he adds: "Long after the period to which we have alluded, the doctrine that the Constitution is the supreme law of the land, and that the judiciary have authority to set aside . . . Acts repugnant thereto, was considered anti-republican." In 1814,<sup>1</sup> for the first time, I believe, we find this court announcing an Act of the State Legislature to be "void as against the Constitution of the State and the United States, and even the laws of nature." It may be remarked here that the doctrine of declaring legislative Acts void as being contrary to the Constitution, was probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution, that courts might disregard such Acts if they were contrary to the fundamental maxims of morality, or, as it was phrased, to the laws of nature. Such a doctrine was thought to have been asserted by English writers, and even by judges at times, but was never acted on. It has been repeated here, as matter of speculation, by our earlier judges, and occasionally by later ones; but in no case within my knowledge has it ever been enforced where it was the single and necessary ground of the decision, nor can it be, unless as a revolutionary measure.<sup>2</sup>

In Swift's System of the Laws of Connecticut, published in 1795,<sup>3</sup> the author argues strongly and elaborately against the power of the judiciary to disregard a legislative enactment, while mentioning that the contrary opinion "is very popular and prevalent." "It will be agreed," he says, "it is as probable that the judiciary will declare laws unconstitutional which are not so, as it is that the legislature will exceed their constitutional authority." But he makes the very noticeable admission that there may be cases so monstrous, — *e. g.*, an Act authorizing conviction for crime without evidence, or securing to the legislature their own seats for life, — "so manifestly unconstitutional that it would seem wrong to require the judges to regard it in their decisions." As late as 1807 and 1808, judges were impeached by the Legislature of Ohio for holding Acts of that body to be void.<sup>4</sup>

When at last this power of the judiciary was everywhere established, and added to the other bulwarks of our written constitutions, how was the power to be conceived of? Strictly as a judicial one. . . . Therefore, since the power now in question was a purely judicial one, in the first place, there were many cases where it had no operation. In the case of purely political acts and of the exercise of mere discretion, it mattered not that other departments were violating the Constitution, the judiciary could not interfere; on the contrary, they must accept and enforce their Acts. Judge Cooley has lately said:<sup>5</sup> "The common impression undoubtedly is that in the case of any legislation where the bounds of constitutional authority are disregarded, . . . the judiciary is perfectly competent to afford the adequate remedy; that the Act indeed must be void, and that any citizen, as well as the judiciary itself, may treat it as void, and refuse obedience. This, however, is far from being the fact."

Again, where the power of the judiciary did have place, its whole scope was this; namely, to determine, for the mere purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of power was forbidden by the Constitution. In doing this the court was so to discharge its office as not to deprive another department of any of its proper power, or to limit it in the proper

<sup>1</sup> *Dupuy v. Wickwire*, 1 D. Chipman, 237.

<sup>2</sup> This subject is well considered in a learned note to *Paxton's Case* (1761), Quincy's Rep. 51, 520, relating to Writs of Assistance. The American cases sometimes referred to as deciding that a legislative Act was void, as being contrary to the first principles of morals or of government, — *e. g.*, in Quincy, 529, citing *Bowman v. Middleton*, 1 Bay, 252, and in 1 Bryce, Am. Com. 431, n., 1st ed., citing *Gardner v. Newburgh*, 2 Johns. Ch. Rep. 162, — will be found, on a careful examination, to require no such explanation.

<sup>3</sup> Vol. i. 50 *et seq.*

<sup>4</sup> Cooley, Const. Lim., 6th ed., 193, n.; 1 Chase's Statutes of Ohio, preface, 38-40. For the last reference I am indebted to my colleague, Professor Wambaugh.

<sup>5</sup> Journal of the Michigan Pol. Sc. Association, i. 47.

range of its discretion. Not merely, then, do these questions, when presenting themselves in the courts for judicial action, call for a peculiarly large method in the treatment of them, but especially they require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot. In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere, since *their* question is a naked judicial one.

Moreover, such is the nature of this particular judicial question that the preliminary determination by the legislature is a fact of very great importance, since the constitutions expressly intrust to the legislature this determination; they cannot act without making it. Furthermore, the constitutions not merely intrust to the legislatures a preliminary determination of the question, but they contemplate that this determination may be the final one; for they secure no revision of it. It is only as litigation may spring up, and as the course of it may happen to raise the point of constitutionality, that any question for the courts can regularly emerge. It may be, then, that the mere legislative decision will accomplish results throughout the country of the profoundest importance before any judicial question can arise or be decided, — as in the case of the first and second charters of the United States Bank, and of the legal tender laws of thirty years ago and later. The constitutionality of a bank charter divided the cabinet of Washington, as it divided political parties for more than a generation. Yet when the first charter was given, in 1791, to last for twenty years, it ran through its whole life unchallenged in the courts, and was renewed in 1816. Only after three years from that did the question of its constitutionality come to decision in the Supreme Court of the United States. It is peculiarly important to observe that such a result is not an exceptional or unforeseen one; it is a result anticipated and clearly foreseen. Now, it is the legislature to whom this power is given, — this power, not merely of enacting laws, but of putting an interpretation on the Constitution which shall deeply affect the whole country, enter into, vitally change, even revolutionize the most serious affairs, except as some individual may find it for his private interest to carry the matter into court. So of the legal tender legislation of 1863 and later. More important action, more intimately and more seriously touching the interests of every member of our population, it would be too hard to think of. The constitutionality of it, although now upheld, was at first denied by the Supreme Court of the United States. The local courts were divided on it, and professional opinion has always been divided. Yet it was the legislature that determined this question, not merely primarily, but once for all, except as some individual, among the innumerable chances of his private affairs, found it for his interest to raise a judicial question about it.

It is plain that where a power so momentous as this primary authority to interpret is given, the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect; and this not on mere grounds of courtesy or conventional respect, but on very solid and significant grounds of policy and law. The judiciary may well reflect that if they had been regarded by the people as the chief protection against legislative violation of the Constitution, they would not have been allowed merely this incidental and postponed control. They would have been let in, as it was sometimes endeavored in the conventions to let them in, to a revision of the laws before they began to operate.<sup>1</sup> As the opportunity of the judges to check and correct

<sup>1</sup> The Constitution of Colombia, of 1886, art. 84, provides that the judges of the Supreme Court may take part in the legislative debates over "bills relating to civil matters and judicial procedure." And in the case of legislative bills which are objected to by "the government" as unconstitutional, if the legislature insist on the bill, as against a veto by the government, it shall be submitted to the Supreme Court, which is to decide upon this question finally. Arts. 90 and 150. See a translation of this Constitution by Professor Moses, of the University of California, in the supplement to the Annals of the American Academy of Political and Social Science, for January,

unconstitutional Acts is so limited, it may help us to understand why the extent of their control, when they do have the opportunity, should also be narrow.

It was, then, all along true, and it was foreseen, that much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one. Their interference was but one of many safeguards, and its scope was narrow.

The rigor of this limitation upon judicial action is sometimes freely recognized, yet in a perverted way which really operates to extend the judicial function beyond its just bounds. The court's duty, we are told, is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the Constitution as being of superior obligation, — an ordinary and humble judicial duty, as the courts sometimes describe it. This way of putting it easily results in the wrong kind of disregard of legislative considerations; not merely in refusing to let them directly operate as grounds of judgment, but in refusing to consider them at all. Instead of taking them into account and allowing for them as furnishing possible grounds of legislative action, there takes place a pedantic and academic treatment of the texts of the Constitution and the laws. And so we miss that combination of a lawyer's rigor with a statesman's breadth of view which should be found in dealing with this class of ques-

1893. We are much too apt to think of the judicial power of disregarding the acts of the other departments as our only protection against oppression and ruin. But it is remarkable how small a part this played in any of the debates. The chief protections were a wide suffrage, short terms of office, a double legislative chamber, and the so-called executive veto. There was, in general, the greatest unwillingness to give the judiciary any share in the law-making power. In New York, however, the Constitution of 1777 provided a Council of Revision, of which several of the judges were members, to whom all legislative Acts should be submitted before they took effect. That existed for more than forty years, giving way in the Constitution of 1821 to the common expedient of merely requiring the approval of the executive, or in the alternative, if he refused it, the repassing of the Act, perhaps by an increased vote, by both branches of the legislature. In Pennsylvania (Const. of 1776, § 47) and Vermont (Const. of 1777, § 44) a Council of Censors was provided for, to be chosen every seven years, who were to investigate the conduct of affairs, and point out, among other things, all violations of the Constitution by any of the departments. In Pennsylvania this arrangement lasted only from 1776 to 1790; in Vermont from 1777 to 1870. In framing the Constitution of the United States, several of these expedients, and others, were urged, and at times adopted; *e. g.*, that of New York. It was proposed at various times that the general government should have a negative on all the legislation of the States; that the governors of the States should be appointed by the United States, and should have a negative on State legislation; that a Privy Council to the President should be appointed, composed in part of the judges; and that the President and the two Houses of Congress might obtain opinions from the Supreme Court. But at last the convention, rejecting all these, settled down upon the common expedients of two legislative Houses, to be a check upon each other, and of an executive revision and veto, qualified by the legislative power of reconsideration and enactment by a majority of two-thirds; — upon these expedients, and upon the declaration that the Constitution, and constitutional laws and treaties, shall be the supreme law of the land, and shall bind the judges of the several States. This provision, as the phrasing of it indicator, was inserted with an eye to secure the authority of the general government as against the States, *i. e.*, as an essential feature of any efficient Federal system, and not with direct reference to the other departments of the government of the United States itself. The first form of it was that "legislative Acts of the United States, and treaties, are the supreme law of the respective States, and bind the judges there as against their own laws."

tions in constitutional law. Of this petty method we have many specimens; they are found only too easily to-day in the volumes of our current reports.

In order, however, to avoid falling into these narrow and literal methods, in order to prevent the courts from forgetting, as Marshall said, that "it is a constitution we are expounding," these literal precepts about the nature of the judicial task have been accompanied by a rule of administration which has tended, in competent hands, to give matters a very different complexion. — THAYER'S *Origin and Scope of the American Doctrine of Constitutional Law*, 4-12. — ED.

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### ADM'RS OF BYRNE v. ADM'RS OF STEWART.

COURT OF EQUITY OF SOUTH CAROLINA. 1812.

[3 Des. 466.]

... *Mr. Pringle, Mr. Ford, and Mr. Simons* argued against the rule. *Mr. Smith*, in support of the rule.

CHANCELLOR WATIES, after taking time to deliberate, delivered the following judgment:

A rule was taken out in this case against C. Lining, Esq., to show cause why another solicitor should not be substituted in his place for the defendants, on account of his being the ordinary for Charleston district, and disqualified as such from practising as a solicitor by an Act passed in December, 1811.

The defendant showed for cause that the Act of the Legislature which restrains him as aforesaid, is void, because it is an *ex post facto* law; and that it is also void because it deprives him of a right of freehold, without the judgment of his peers, or any law authorized by the Constitution.

It has been correctly said in the argument that the question for the court in this case is not whether the Act complained of is a just and proper one, but whether the legislature had a right to make it? The power and the duty of the court to declare an act void, which violates any right of the citizen secured to him by the Constitution, have been admitted on both sides, and I feel so strong a sense of this duty, that if the violation complained of was manifest, I should not only declare the Act void, but in doing so I should think that I rendered a more important service to my country than I could by discharging the ordinary duties of a judge for many years.

It is the peculiar and characteristic excellence of the free governments of America, that the legislative power is not supreme; but that it is limited and controlled by written constitutions, to which the judges, who are sworn to defend them, are authorized to give a transcendent operation over all laws that may be made in derogation of them.

This judicial check affords a security here for civil liberty, which belongs to no other governments in the world; and if the judges will everywhere faithfully exercise it, the liberties of the American nation



may be rendered perpetual. But while I assert this power in the court, and insist on the great value of it to the community, I am not insensible of the high deference which is due to the legislative authority. It is supreme in all cases in which it is not restrained by the Constitution; and as it is the duty of the legislators as well as of the judges to consult this and conform their acts to it, so it ought to be presumed that all their acts are conformable to it, unless the contrary is manifest. This confidence in the wisdom and integrity of the legislature, is necessary to ensure a due obedience to its authority; for if this is frequently questioned, it must tend to diminish that reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law. It would be unwise to do so on another account. The interference of the judicial power with legislative acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power, and so general a prejudice against it, as to lead to measures, which might end in the total overthrow of the independence of the judiciary, and with it this best preservative of the Constitution. The validity of a law ought not then to be questioned, unless it is so obviously repugnant to the Constitution, that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it may be promoted, and its salutary effects be justly and fully appreciated. . . . [The court negatived both grounds of defence.

*Rule absolute.*]<sup>1</sup>

<sup>1</sup> In 1811,<sup>1</sup> Chief Justice Tilghman, of Pennsylvania, while asserting the power of the court to hold laws unconstitutional, but declining to exercise it in a particular case, stated the rule of administration as follows: "For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt." In *Oyden v. Saunders*, 12 Wheat. 213 (1827), Mr. Justice Washington, after remarking that the question was a doubtful one, said: "If I could rest my opinion in favor of the constitutionality of the law . . . on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the . . . legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt. This has always been the language of this court when that subject has called for its decision; and I know it expresses the honest sentiments of each and every member of this bench." In the *Sinking Fund Cases*, 99 U. S. 700 (1878), Chief Justice Waite, for the court, said: "This declaration [that an Act of Congress is unconstitutional] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." In *Wellington et al., Petitioners*, 16 Pick. 87 (1834), Chief Justice Shaw, for the court, remarked that it was proper "to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an Act of legislation [they

<sup>1</sup> *Commonwealth v. Smith*, 4 Bin. 117.

will] never declare a statute void unless the nullity and invalidity of the Act are placed, in their judgment, beyond reasonable doubt."

On this subject see Cooley, *Const. Lim.*, 6th ed. 216, and Thayer's *Origin and Scope of the American Doct. of Const. Law*, 12-30. In the last-named pamphlet, the following passage is found at page 27:—

"Finally, let me briefly mention one or two discriminations which are often overlooked, and which are important in order to a clear understanding of the matter. Judges sometimes have occasion to express an opinion upon the constitutionality of a statute, when the rule which we have been considering has no application, or a different application from the common one. There are at least three situations which should be distinguished: (1) where judges pass upon the validity of the acts of a co-ordinate department; (2) where they act as advisers of the other departments; (3) where, as representing a government of paramount authority, they deal with acts of a department which is not co-ordinate.

"(1) The case of a court passing upon the validity of the act of a co-ordinate department is the normal situation, to which the previous observations mainly apply. I need say no more about that.

"(2) As regards the second case, the giving of advisory opinions, this, in reality, is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority.<sup>1</sup> A single exceptional and unsupported opinion upon this subject, in the State of Maine, made at a time of great political excitement,<sup>2</sup> and a doctrine in the State of Colorado, founded upon considerations peculiar to the Constitution of that State,<sup>3</sup> do not call for any qualification of the general remark, that such opinions, given by our judges,—like that well-known class of opinions given by the judges in England when advising the House of Lords, which suggested our own practice,—are merely advisory, and in no sense authoritative judgments.<sup>4</sup> Under our constitutions such opinions are not generally given. In the six or seven States where the constitutions provide for them, it is the practice to report these opinions among the regular decisions, much as the responses of the judges in *Queen Caroline's Case*, and in *MacNaghten's Case*, in England, are reported, and sometimes cited, as if they held equal rank with true adjudications. As regards such opinions, the scruples, cautions, and warnings of which I have been speaking, and the rule about a reasonable doubt, which we have seen emphasized by the courts as regards judicial decisions upon the constitutionality of legislative Acts, have no application. What is asked for is the judge's own opinion.

"(3) Under the third head come the questions arising out of the existence of our double system, with two written constitutions, and two governments, one of which, within its sphere, is of higher authority than the other. The relation to the States

<sup>1</sup> *Commonwealth v. Green*, 12 Allen, 163; *Taylor v. Place*, 4 R. I. 362. See Thayer's *Memorandum on Advisory Opinions* (Boston, 1885), Jameson, *Const. Conv.*, 4th ed., Appendix, note e, 667, and a valuable article by H. A. Dubuque, in 24 *Am. Law Rev.* 369, on "The Duty of Judges as Constitutional Advisers."

<sup>2</sup> Opinion of Justices, 70 Me. 583 (1880). *Contra*, Kent, J., in 58 Me. 573 (1870): "It is true, unquestionably, that the opinions given under a requisition like this have no judicial force, and cannot bind or control the action of any officer of any department. They have never been regarded as binding on the body asking for them." And so Tapley, J., *Ib.* 615: "Never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion;" and Libby, J., in 72 Me. 562-563 (1881): "Inasmuch as any opinion now given can have no effect if the matter should be judicially brought before the court by the proper process, and lest, in declining to answer, I may omit the performance of a constitutional duty, I will very briefly express my opinion upon the question submitted." Walton, J., concurred; the other judges said nothing on this point.

<sup>3</sup> *In re Senate Bill*, 12 Colo. 466, —an opinion which seems to me, in some respects, ill considered.

<sup>4</sup> *Macqueen's Pract. Ho. of Lords*, 49, 50.

IN *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Vt. 140 (1854), there was an action on the case to recover damages for sheep of the plaintiff killed by one of the defendants' locomotives, upon their railroad track, where said sheep had escaped in consequence of there being no cattle-guard at a farm-crossing, across the defendants' railroad on the plaintiff's land in Charlotte. The only question reserved at the trial in the County Court was, whether the defendants were bound by the provision in the general railroad Act of 1849, requiring railroad companies to construct and maintain cattle-guards; there being no such obligation imposed upon the defendants by their charter, which was granted in 1843. In holding that they were so bound, the court (REDFIELD, C. J.) said: "The present case involves the question of the right of the legislature to require existing railways to respond in damages for all cattle killed or injured by their trains until they erect suitable cattle-guards

of the paramount government as a whole, and its duty in all questions involving the powers of the general government to maintain that power as against the States in its fulness, seem to fix also the duty of each of its departments; namely, that of maintaining this paramount authority in its true and just proportions, to be determined by itself. If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department. When the question relates to what is admitted not to belong to the national power, then whoever construes a State constitution, whether the State or national judiciary, must allow to that legislature the full range of rational construction. But when the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand. Fundamentally, it involves the allotment of power between the two governments, — where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its limit; but the departments are not co-ordinate, and the limit is at a different point. The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation to be fixed by itself; and having fixed this, to guard it against any inroads from without.

"I have been speaking of the national judiciary. As to how the State judiciary should treat a question of the conformity of an Act of their own Legislature to the paramount constitution, it has been plausibly said that they should be governed by the same rule that the Federal courts would apply. Since an appeal lies to the Federal courts, these two tribunals, it has been said, should proceed on the same rule, as being parts of one system. But under the Judiciary Act an appeal does not lie from every decision; it only lies when the State law is *sustained* below. It would perhaps be sound on general principles, even if an appeal were allowed in all cases, here also to adhere to the general rule that judges should follow any permissible view which the co-ordinate legislature has adopted. At any rate, under existing legislation it seems proper in the State court to do this, for the practical reason that this is necessary in order to preserve the right of appeal."<sup>1</sup> — ED.

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<sup>1</sup> Gibson, J., in *Eakin v. Raub*, 12 S. & R. 357. Compare *Ib.* 352. The same result is reached by the court, on general principles, in *The Tonnage Tax Cases*, 62 Pa. St. 286: "A case of simple doubt should be resolved favorably to the State law, leaving the correction of the error, if it be one, to the Federal judiciary. The presumption in favor of a co-ordinate branch of the State government, the relation of her courts to the State, and, above all, the necessity of preserving a financial system so vital to her welfare, demand this at our hands." — AGNEW, J., for the court.

at farm-crossings. No question could be made where such a requisition was contained in the charter of the corporation, or in the general laws of the State at the date of the charter. But where neither is the case, it is claimed that it is incompetent for the legislature to impose such an obligation by statute, subsequent to the date of the charter. It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American States. We cannot well comprehend how, upon principle, it should be otherwise. The people must of course possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular State in question. I am not aware that the Constitution of this State contains any restriction upon the legislature in regard to corporations, unless it be that where 'any person's property is taken for the use of the public, the owner ought to receive an equivalent in money;' or that there is any such restriction in the United States Constitution, except that prohibiting the States from 'passing any law impairing the obligation of contracts.' It is a conceded point, upon all hands, that the Parliament of Great Britain is competent to make any law binding upon corporations, however much it may increase their burdens or restrict their powers, whether general or organic, even to the repeal of their charters. This extent of power is recognized in the case of *Dartmouth College v. Woodward*, 4 Wheaton, 518, and the leading authorities are there referred to. Any requisite amount of authority, giving this unlimited power over corporations to the British Parliament, may readily be found. And if, as we have shown, the several State legislatures have the same extent of legislative power, with the limitations named, the inviolability of these artificial bodies rests upon the same basis in the American States with that of natural persons, and there are, no doubt, many of the rights, powers, and functions of natural persons which do not come within legislative control. Such, for instance, as are purely and exclusively of private concern, and in which the body politic, as such, have no special interest."<sup>1</sup>

<sup>1</sup> "The legislative power of a State extends to everything within the sphere of such power, except as it is restricted by the Federal Constitution or that of the State."—SWAYNE, J. (for the court), in *Township v. Talcott*, 19 Wall. p. 576 (1873). "The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the Constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed."—FULLER, C. J. (for the court), in *McPherson v. Blacker*, 146 U. S. p. 25. "Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a State, except those imposed by its written Constitution."—FULLER, C. J. (for the court), in *Giozza v. Tiernan*, 148 U. S. p. 661.—ED.

## TAYLOR v. PLACE.

SUPREME COURT OF RHODE ISLAND. 1856.

[4 R. I. 324.]<sup>1</sup>

*James Tillinghast and Bradley*, for the plaintiffs; *Currey*, for the defendants.

AMES, C. J. . . . In some cases, it is difficult to draw and apply the precise line separating the different powers of government which, under our political systems, Federal and State, are, without exception, carefully distributed between the legislative, the executive, and the judicial departments. To some extent, and in some sense, each of the powers appropriated to different departments in the above distribution must be exercised by every other department of the government, in order to the proper performance of its duty. As illustrated by Mr. Justice McLean, in giving the judgment of the Supreme Court of the United States, in the case of *Watkins v. Holman et al.*, 16 Pet. 60, 61. "The executive, in acting upon claims for services rendered, may be said to exercise, if not in form, in substance, judicial power. And so a court, in the use of a discretion essential to its existence, by the adoption of rules or otherwise, may be said to legislate. A legislature, too, in providing for the payment of a claim, exercises a power in its nature judicial; but this is coupled with the paramount and remedial power." In an early case, which we shall have occasion hereafter to use for another purpose, the question came before the courts of the United States, under the clause of the Constitution of the United States distributing the different powers of the Federal government amongst its different departments, whether a power lodged, by an Act of Congress, in the Circuit Courts of the United States, to inquire into and to take evidence of the claims of invalid pensioners, and to transmit the result of their inquiries to the Secretary of War, for his action and that of Congress thereon, was judicial power, and so the exercise of it imperative upon the Circuit judges. The unanimous opinion of the Circuit Court for the district of New York, then consisting of Jay, Chief Justice, Cushing, Justice, and Duane, District Judge; of the Circuit Court for the district of Pennsylvania, then consisting of Wilson and Blair, Justices, and of Peters, District Judge; and of the Circuit Court for the district of North Carolina, then consisting of Iredell, Justice, and of Sitgreaves, District Justice, — was, that the power thus vested was not judicial, and that consequently they were not bound to exercise it.<sup>2</sup> The reasons given by them were, in substance, that the Act of Congress did not contemplate this power as judicial, inasmuch as it subjected the decisions of the courts, in the matter to which it related, to the consideration and suspension of the Secretary of War, and again to the revision

<sup>1</sup> The statement of facts and a part of the case are omitted.

<sup>2</sup> These were not judicial utterances. See *ante*, p. 105, n. — ED.

of Congress ; whereas, by the Constitution, neither the Secretary of War, nor any other executive officer, nor even the legislature, were authorized to sit, as a court of errors, on the judicial acts or opinions of the courts of the United States. The judges composing the Circuit Court of New York, however, consented, on account of the benevolence which had dictated the passage of the pension Act in question, personally to execute the duties imposed upon them in the character of commissioners appointed by official instead of personal descriptions ; deeming themselves at liberty, as individuals, to accept or decline the office thus tendered to them. See the opinions in the note illustrating *Hayburn's Case*, 2 Dallas, 410, 411, 412, and in 1 Curtis's Decis. Sup. Ct. U. S. 9, 10, and 11. In *Watkins v. Holman et al.*, before quoted, the question arose before the Supreme Court of the United States, under the Constitution of Alabama, containing a like distribution of powers with our own, whether an Act of the Legislature of that State, authorizing an administratrix residing in another State, to sell and convey, by certain attorneys named in the Act, the real estate of her intestate husband in Alabama, for the payment of his debts, her attorneys giving bond with sureties for the faithful payment of the proceeds of sale to the administratrix, "to be appropriated to the payment of the debts of the deceased," was a judicial Act, and so within the inhibition of the Constitution of Alabama. The court held the Act to be valid, as the exercise, not of judicial, but of legislative power ; the Act providing a special remedy, merely, for a case which, on account of its circumstances, though within the spirit, was not within the letter of the General Statute of Alabama, which directed the mode in which the real estate of a deceased debtor should be sold and applied to the payment of his debts. Again, in the late case of *United States v. Ferreira*, 18 Howard, 40, 48, the same court held that an Act of Congress, empowering the district judge of Florida, under the treaty with Spain of 1819, commonly called the Florida treaty, to examine and adjudge claims for injuries made by the Spanish inhabitants of Florida, provided for by a clause in that treaty, and to report his decisions, if favorable to the claimants, with the evidence, to the Secretary of the Treasury, for his discretionary action thereon, did not confer upon the District Court of Florida judicial power, in the sense of the Constitution of the United States, in that matter ; and hence, that no appeal from the award of the judge, thus acting merely as a commissioner, could be brought to the Supreme Court of the United States. The court followed precisely the line of reasoning which must have been adopted by the judges in *Hayburn's Case*, in 1792, as illustrated by the opinions given in the note to that case, which the court recite at large. In the opinion of the court, delivered by the present venerable Chief Justice, he says : "The powers conferred by these Acts of Congress upon the judge, as well as the secretary, are, it is true, judicial in their nature ; for judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner

appointed to adjust claims to lands or money, under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as a commissioner, but is not judicial in either case, in the sense in which judicial power is granted by the Constitution, to the courts of the United States;” and see *American Ins Co. v. Carter*, 1 Peters, 511; *Benner v. Porter*, 9 Howard, 235; *United States v. Ritchie*, 17 Howard, 533, 534. Upon the same principle, the decisions of the various State auditors of this and other States, or even of the Court of Claims, recently established at Washington, though this latter sits as a court, takes and receives evidence, and hears counsel as a court, subject, as they all are, to the revision and control of their respective legislatures or of Congress, are not judicial decisions, in the sense of the Constitution of the States, or of the United States. They may, and the latter does, task high judicial capacity, learning, and experience, and is called a court; but after all, these officers, and the members of this tribunal, sit as auditors only, and not as judges, in any constitutional sense. “That the auditing of the accounts of a receiver of public moneys,” says Mr. Justice Curtis, in recently delivering the opinion of the Supreme Court in *Murray’s lessee et al. v. Hoboken Land and Improvement Company*, 18 Howard, 280, “may be, in an enlarged sense, a judicial act, must be admitted. So are those administrative duties, the performance of which involves an inquiry into the existence of facts, and the application to them of rules of law. In this sense, the act of the President in calling out the militia, under the Act of 1795, or of a commissioner, who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact.” One of the points decided in this case was, that the auditing of an account, and ascertaining a balance, by the first Auditor of the Treasury of the United States, and the issue of a distress warrant by the Solicitor of the Treasury, under an Act of Congress, by virtue of and under which the lands of a defaulting collector of the customs were seized and held to satisfy the balance ascertained by the auditor to be due to the treasury, were not acts of judicial power, in the sense of the Constitution; that they might, therefore, under the law, be constitutionally, and with effect, done by those officers, although neither of them constituted a court, nor were so connected with a court as to perform any, even of the ministerial duties, which arise out of judicial proceedings. *Murray’s lessee et al. v. Hoboken Land and Improvement Company*, 18 Howard, 275.

On the other hand, it may safely be said, that to hear and decide adversary suits at law and in equity, with the power of rendering judgments and entering up decrees according to the decision, to be executed by the process and power of the tribunal deciding, or of another tribunal acting under its orders and according to its direction, is the exercise of

judicial power, in the constitutional sense; and that it is so, whether the decision be final, or subject to reversal on error or appeal. It is precisely thus, that the great exemplar of constitutional law, the Constitution of the United States, defines this power; for, after vesting, by the first section of its third article, "the judicial power of the United States," in "one supreme court, and in such inferior courts as Congress may, from time to time, order and establish;" and after, in the same section, fixing the tenure and mode of compensating the judges of the courts of the United States; it proceeds, in the second section of the same article, to define this power, by stating the cases and controversies in law and equity, and of admiralty and maritime jurisdiction, to which, from the nature of the questions involved in them, or of the principles of decision to be applied to them, or from the character or citizenship of the parties to them, or to be affected by them, this power, whether original or appellate, shall extend. In *Osborn v. The Bank of the United States*, 9 Wheaton, 319, Chief Justice Marshall, in delivering the opinion of the court, after saying that the second article of the Constitution vests the whole executive power in the President, and that the third article, among other things, declares, "that the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority," thus speaks of the effect and extent of the latter: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting upon it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case; and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States." The judicial power is exercised in the decision of cases; the legislative, in making general regulations, by the enactment of laws. The latter acts from considerations of public policy; the former is guided by the pleadings and evidence in the case. Per Mr. Justice McLean. *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 Howard, 440. Indeed, laws and courts have their origin in the necessity of rules and means to enforce them, to be applied to cases and controversies within their jurisdiction; and our whole idea of judicial power is, the power of the latter to apply the former to the decision of those cases and controversies. . . .



## THE STATE v. WHEELER.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1856.

[25 Conn. 290.]

THIS was a complaint preferred by a grand juror of the town of New Haven, to a justice of the peace, against Stephen Wheeler, for keeping spirituous liquors with intent to sell the same in violation of the statute of 1854, entitled "An Act for the Suppression of Intemperance."

A trial was had before the justice, and the defendant found guilty. From this decision he appealed to the Superior Court, and the cause was tried at the term of said court holden at New Haven, in September, 1855.

Upon the trial the defendant's counsel requested the court to instruct the jury that the statute upon which the information was founded was unconstitutional and void. The court did not comply with this request, but did instruct them that the section of the Act upon which the information was founded, prohibiting the keeping of spirituous liquors with intent to sell the same contrary to the provisions of said Act, was constitutional and valid. The court did not express any opinion upon other sections of the Act. The jury having returned a verdict against the defendant, he filed a motion for a new trial, which motion was reserved for the advice of this court.

*Flagg*, in support of the motion.

*Foster* (State Attorney) and *Candee*, against the motion.

STORRS, J. The information in this case is founded on the ninth section of the Act for the suppression of intemperance. (Rev. Stat., 821.) That section provides that no person under the penalties therein prescribed, shall own or keep any spirituous or intoxicating liquor, or any mixed liquor of which a part is spirituous or intoxicating, with intent to sell the same in violation of that Act. The only question before us is, whether that provision is constitutional. . . .

Such being the extent of the general legislative power of a State, we come to the inquiry, whether the legislature of this State, in enacting the provisions which we are now considering, have violated any of the provisions of our State Constitution. This point is briefly disposed of by the remark, that we find nothing whatever in that instrument, which either expressly or impliedly restricts, or even touches upon, the exercise of the power of the legislature, in relation to the subject we are examining. . . .

The defendant insists that we should pronounce the law now in question to be void, on the ground that it is opposed to natural right, and the fundamental principles of civil liberty. We are by no means prepared to accede to the doctrine involved in this claim, that, under a written constitution like ours, in which the three great departments of government, the executive, legislative, and judicial, are confided to dis-

tinct bodies of magistracy, the powers of each of which are expressly confined to its own proper department, and in which the powers of each are unlimited in its appropriate sphere, except so far as they are abridged by the Constitution itself, it is competent for the judicial department to deprive the legislature of powers which they are not restricted from exercising by that instrument. It would seem to be sufficient to prevent us from thus interposing, that the power exercised by the legislature is properly legislative in its character, which is unquestionably the case with respect to the law we have been considering, and that the Constitution contains no restriction upon its exercise in regard to the subject of it. There is, however, no occasion to pursue this topic. The law in question is, in our opinion, obnoxious to no objection which could be derived from the establishment of the doctrine advanced by the defendant. It is not different in its character, although it may be more stringent in some of its provisions, from those numerous laws which have been passed in almost all civilized communities, and in ours from the earliest settlement of our State, regulating the traffic in spirituous liquors, and which are based on the power possessed by every sovereign State, to provide by law, as it shall deem fit, for the health, morals, peace, and general welfare of the State; and which, whatever may have been thought of their expediency, have been invariably sustained as being within the competency of the legislature to enact. . . .

In this opinion, the other judges, WAITE and HINMAN, concurred.

*A new trial not granted.*

It is a principle in the English law, that an Act of Parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled, in any court of justice. "It is," says Sir William Blackstone, "the exercise of the highest authority that the kingdom acknowledges upon earth." When it is said in the books, that a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean that the courts are to give the statute a reasonable construction. They will not readily presume, out of respect and duty to the lawgiver, that any very unjust or absurd consequence was within the contemplation of the law. But if it should happen to be too palpable in its direction to admit of but one construction, there is no doubt in the English law as to the binding efficacy of the statute. The will of the legislature is the supreme law of the land, and demands perfect obedience. . . .

The principle in the English government, that the Parliament is omnipotent, does not prevail in the United States; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government. But in this, and all other countries where there is a written constitution, designating the powers and duties of the

legislative, as well as of the other departments of the government, an Act of the Legislature may be void as being against the Constitution. The law with us must conform, in the first place, to the Constitution of the United States, and then to the subordinate Constitution of its particular State, and if it infringes the provisions of either, it is so far void. The courts of justice have a right, and are in duty bound, to bring every law to the test of the Constitution, and to regard the Constitution, first of the United States, and then of their own State, as the paramount or supreme law, to which every inferior or derivative power and regulation must conform. The Constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power, contrary to the true intent and meaning of the Constitution, is absolutely null and void. — 1 *Kent's Com.* (12th ed.), \*447.<sup>1</sup>

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PEOPLE v. SIMEON DRAPER.

NEW YORK COURT OF APPEALS. 1857.

[15 N. Y. 532.]

*Charles O'Connor* and *J. W. Edmonds*, for the appellants.

*W. M. Evarts* and *F. B. Cutting*, for the respondents.

BY THE COURT (DENIO, C. J.). This is an appeal from a judgment of the Supreme Court, sitting in the first district. The complaint is in substance an information in the nature of a *quo warranto*. Its general object is to obtain a judgment upon the right of the defendants to execute the offices of "commissioners of police," to which they have been appointed pursuant to a statute passed at the last session of the legislature. The relator, Fernando Wood, claims that he, as mayor (together with the recorder and city judge of the city of New York), is by law chargeable with and entitled to perform the duties of commissioners of police; and he alleges that the defendants have intruded into and usurped these offices. The special purpose of the action is to obtain a judicial determination as to the constitutional validity of the statute referred to. The defendants have put in an answer, in which they set up their appointment under the Act, and the plaintiffs have demurred. The Supreme Court, holding the Act constitutional, has overruled the demurrer and given judgment for the defendants; and the plaintiffs thereupon prosecute this appeal. . . .

<sup>1</sup> This passage has stood in substantially the same form in all the editions of *Kent's Commentaries*. The book was published in 1826. A single significant change was made in the second edition, in 1832, by introducing that part of the first sentence above quoted which begins with the words "though if there be," &c. — ED.

Before proceeding to the other ground of objection, it will be useful to state certain principles which, though not controverted, have sometimes been overlooked in this argument. In the first place, the people, in framing the Constitution, committed to the legislature the whole law-making power of the State, which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. The first article lays down the ancient limitations which have always been considered essential in a constitutional government, whether monarchical or popular; and there are scattered through the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions, and the general arrangements of the Constitution, are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government; the grant of legislative power itself; the organization of the executive authority; the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature. As it may act upon the State at large, by laws affecting at once the whole country, and all the people, so it may in its discretion, and independently of any prohibition, expressly made or necessarily implied, make special laws relating to any separate district or section of the State. As a political society, the State has an interest in the repression of disorder, and the maintenance of peace and security in every locality within its limits; and if from exceptional causes, the public good requires that legislation, either permanent or temporary, be directed toward any particular locality, whether consisting of one county or of several counties, it is within the discretion of the legislature to apply such legislation, as in its judgment, the exigency of the case may require; and it is the sole judge of the existence of such causes. The representatives of the whole people, convened in the two branches of the legislature, are, subject to the exceptions which have been mentioned, the organs of the public will in every district or locality of the State. It follows that it belongs to the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to local jurisdictions, and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time, as convenience, the efficiency of administration and the public good may seem to require. If a particular Act of Legislation

does not conflict with any of the limitations or restraints which have been referred to, it is not in the power of the courts to arrest its execution, however unwise its provisions may be, or whatever the motives may have been which led to its enactment. There is room for much bad legislation and misgovernment within the pale of the Constitution; but whenever this happens, the remedy which the Constitution provides, by the opportunity for frequent renewals of the legislative bodies, is far more efficacious than any which can be afforded by the judiciary. The courts cannot impute to the legislature any other than public motives for their acts. If a given Act of Legislation is not forbidden by express words, or by necessary implication, the judges cannot listen to a suggestion that the professed motives for passing it are not the real ones. If the Act can be upheld upon any views of necessity or public expediency, which the legislature may have entertained, the law cannot be challenged in the courts. It may be proper to make one other remark of a general character. It has been said that a tendency may be discovered in the Constitution, toward local administration, and in favor of decentralizing, as it is not inaptly called, the powers of government; and that a policy in that direction, more marked than in any of our former systems, is plainly to be traced in several constitutional provisions. This I believe to be true. So far as the convention has proceeded in that direction, it is for the courts to follow; and it may be that, in the construction of doubtful provisions, regard should be had to this political tendency. But we cannot, in furtherance of such a supposed policy, however plainly it may be perceived, create exceptions or restraints on the legislature, which are not fairly contained in the Constitution as it is written. It may be the duty of the legislature to follow out or advance such a line of policy, but the business of the courts is with the text of the fundamental law as they find it. They have no political maxims and no line of policy to further or to advance. Their duty is the humble one of construing the Constitution by the language it contains. . . .

We are of the opinion that the judgment of the Supreme Court should be affirmed, and it is accordingly affirmed.

SHANKLAND, J. The Act of the Legislature, entitled "An Act to establish a Metropolitan Police District and to provide for the Government thereof," is, by these proceedings, alleged to be unconstitutional. That Act, having received the sanction of the legislature and of the executive department of the government, is clothed with all the forms of law. Nevertheless, if its provisions are, directly, or by necessary implication, repugnant to the Constitution, it is the province and duty of the courts so to declare it. But if the law should be found to be within the competency of the legislature, however much we may doubt the policy or wisdom of the enactment, it is our duty to uphold it and vindicate the legislative power. It is needless to say the judicial records of this court show that we have never shrunk from the performance of this duty on just occasions.

The Constitution vests all legislative power in the Senate and Assembly, with certain restrictions and limitations imposed on that body by the Constitution itself. Independent of those limitations, the legislative power is omnipotent within its proper sphere. The legislature, in this respect, is the direct representative of the people, and the delegate and depository of their power. Hence, the limitations of the Constitution are not so much limitations of the legislature as of the power of the people themselves, self-imposed by the constitutional compact. When the court declares a law unconstitutional, it in effect declares that the sovereign power of the people has so far been abdicated by themselves. This consideration has led the courts, in all governments which are based on the theory that all power resides in the people, to give a strict construction to compacts which deprive the people of this sovereign power. It will not be presumed that they intended to abdicate their power, unless they have so declared in express terms or by necessary implication. These principles are fundamental, conservative, and cannot be disregarded without infringement upon the reserved rights and power of the people. Hence, the courts have frequently and uniformly declared that they will not adjudicate a law unconstitutional when it is to be made so by inferences or presumptions only, or when the question rests in doubt. Any other rule of construction would bring the legislative and judicial branches of government into collision, to the ruin of one or both.

The wisdom of the conservative maxims of the courts is further exhibited by the consideration that the legislatures are chosen at frequently occurring elections and for short terms. Hence, if they err in expressing the wants of the people, or exceed their powers, the error or excess may be quietly and quickly corrected by the people themselves, through subsequently elected representatives. But if this court wanders from its judicial orbit, and in its progress collides with a co-ordinate power, when moving in its legitimate sphere, who shall restore the system to harmony and regulate its dynamical forces? Such collision must terminate either in judicial revolution or new constitutional compacts. . . .

All the judges, except BROWN and COMSTOCK, concurring.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> In *Bertholf v. O'Reilly*, 74 N. Y. 509 (1878), ANDREWS, J. (for the court), said: "The question whether the Act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an Act can stand when brought to the test of the Constitution the question of its validity is at an end, and neither the executive or judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. Indeed, under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of fundamental rights by legislation which will not fall within the express or implied prohibition and restraints of the Constitution,

and it is unnecessary to seek for principles outside of the Constitution, under which such legislation may be condemned. . . .

"Admitting, as we do, the soundness of this view, and fully approving it, we come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution."

The same principle is affirmed in *People v. Gillson*, 109 N. Y. 398.

"The rule of law upon this subject appears to be, that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative Act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them. . . .

"The accepted theory upon this subject appears to be this: In every sovereign State there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the Parliament; in the American States it resides in the people themselves as an organized body politic. But the people, by creating the Constitution of the United States, have delegated this power as to certain subjects, and under certain restrictions, to the Congress of the Union; and that portion they cannot resume, except as it may be done through amendment of the national Constitution. For the exercise of the legislative power, subject to this limitation, they create, by their State Constitution, a legislative department upon which they confer it; and granting it in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as at the same time they saw fit to impose restrictions. While, therefore, the Parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American States possess the same power, except, first, as it may have been limited by the Constitution of the United States; and, second, as it may have been limited by the Constitution of the State. A legislative Act, cannot, therefore, be declared void, unless its conflict with one of these two instruments can be pointed out." *Cooley, Const. Lim.* (6th ed.) 200.

In *Loan Association v. Topeka*, 20 Wall. 655, 662 (1874) MILLER, J. (for the court), on error to the United States Circuit Court for the District of Kansas, in holding a State statute invalid as imposing taxation for a merely private purpose, said: "We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right. *Olcott v. Supervisors*, 16 Wallace, 689; *People v. Salem*, 20 Mich. 452; *Jenkins v. Andover*, 103 Mass. 94; *Dillon v. Municipal Corporations*, § 587; 2 Redfield's Laws of Railways, 398, rule 2. It must be conceded that there are such rights in every free government beyond the control of the State. A government

which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments, are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B. *Whiting v. Fond du Lac*, 25 Wis. 188; *Cooley on Constitutional Limitations*, 129, 175, 487; *Dillon on Municipal Corporations*, § 587."

In *Munn v. Illinois*, 94 U. S. 113, 124 (1876), WAITE, C. J. (for the court) said: "When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions."

In *Chic. & Grand Tr. Ry. Co. v. Wellman*, 143 U. S. 339 (1891), on error to the Supreme Court of Michigan, a question involving the validity, under the Constitution of the United States, of a State law regulating the charges of a railroad corporation, had been raised on an agreed statement of facts, supplemented by the evidence of two witnesses. In sustaining the decision of the State court, which had refused to hold the law unconstitutional, the Supreme Court of the United States (BREWER, J.) said: "The Supreme Court of Michigan in passing upon the present case, felt constrained to make this observation: 'It being evident from the record that this was a friendly suit between the plaintiff and the defendant to test the constitutionality of this legislation, the Attorney-General, when it was brought into this court upon writ of error, very properly interposed and secured counsel to represent the public interest. In the stipulation of facts or in the taking of testimony in the court below, neither the Attorney-General nor any other person interested for or employed in behalf of the people of the State took any part. What difference there might have been in the record had the people been represented in the court below, however, under our view of the case, is not of material inquiry.'

"Counsel for plaintiff in error, referring to this, does not question or deny, but says: 'The Attorney-General speaks of the case as evidently a friendly case, and Justice Morse, in his opinion, also so speaks of it. This may be conceded; but what of it? There is no ground for the claim that any fraud or trickery has been practised in presenting the testimony.'

"We think there is much in the suggestion. The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts;



## NOTE.

## I. ADMINISTRATIVE RULES IN CONSTITUTIONAL LAW.

"THE following general propositions," it is remarked by Cooley (*Principles of Constitutional Law*, 2d ed. 152),<sup>1</sup> "will be found to state the obligations of duty and of forbearance for such cases which are generally recognized.

"1. The duty to pass upon a question of constitutional law may devolve upon a court of any grade, and of either the Federal or the State jurisdiction. Wherever the question can arise in court of the conformity of a statute to the Constitution, the court to whom the question is addressed must in some manner dispose of it, and the power of the court to apply the law to the case necessarily embraces the power to determine what law controls. In the absence of authoritative precedents, there can be no other test of this than the judgment of the court. The validity of a Federal statute may therefore be a necessary question for consideration in a State court, and that of a State statute in a Federal court. Nevertheless, when the court to whom the question is addressed is not the court of last resort in respect thereto, it may well be expected to proceed with more than ordinary caution and hesitation, and to abstain altogether from declaring a statute invalid unless in the clearest cases, especially if, without serious detriment to justice, the decision can be delayed until the Superior Court can have opportunity to pass upon it. There may be cases where, by inadvertence or accident, a bill which has gone through all the forms required for valid legislation is, nevertheless, clearly and without question invalid; but except in such cases the spectacle of an

and that the latter are given an immediate and general supervision of the constitutionality of the Acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any Act of any Legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the Act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity, in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative Act.

"These observations are pertinent here. On the very day the Act went into force the application for a ticket is made, a suit commenced, and within two months a judgment obtained in the trial court; a judgment rendered not upon the presentation of all the facts from the lips of witnesses, and a full inquiry into them, but upon an agreed statement which precludes inquiry into many things which necessarily largely enter into the determination of the matter in controversy. A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were \$2,404,-516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an Act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends." — ED.

<sup>1</sup> Quoted by permission of the author, and of the publishers, Messrs. Little, Brown, and Co., of Boston. — ED.

inferior magistrate, having merely police or other limited jurisdiction, assuming to pass judgment upon the legislation of his State or country, and declare it invalid, can only be ludicrous.<sup>1</sup>

"2. The judicial sense of propriety and of the importance of the occasion will generally incline the court to refuse a consideration of a constitutional question without the presence of a full bench of judges. With many courts this is a rule to which few exceptions are admitted, and those only which seem to be imperative.

"3. Neither, as a rule, will a court express an opinion adverse to the validity of a statute, unless it becomes absolutely necessary to the determination of a cause before it. Therefore, in any case where a constitutional question is raised, if the record presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, the court will adopt that course, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable. This course has not always been followed; but it has seldom occurred that a constitutional question has been considered settled, or been allowed to remain without further dispute and question where the opinion given upon it was rendered in a case not necessarily requiring it. Want of jurisdiction of the particular case is always reason why the court should abstain from expressing opinions on other questions which parties may attempt to raise.

"4. The court will not listen to an objection made to the constitutionality of an Act by one whose rights are not affected by it, and who consequently can have no interest in defeating it. For example, one who has received compensation for property appropriated by statute to a public use will not be suffered afterwards to dispute the constitutional validity of the statute. The statute is assumed to be valid until some one complains of it whose rights it invades. The power of the court can be invoked only when it is found necessary to secure and protect a party before it against an unwarranted exercise of legislative power to his prejudice.

"5. Nor can a court declare a statute unconstitutional and void when the objection to it is merely that it is unjust and oppressive, and violates rights and privileges of the citizen, unless it can be shown that such injustice is prohibited, or such rights and privileges guaranteed, by the Constitution. The propriety or justice or policy of legislation, within the limits of the Constitution, is exclusively for the legislative department to determine; and the moment a court ventures to substitute its own judgment for that of the legislature, it passes beyond its legitimate authority, and enters a field where it would be impossible to set limits to its interference, except as should be prescribed in its own discretion. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency, with the law-making power. The question of the validity of a statute must always be one of legislative competency to enact it; not one of policy, propriety, or strict justice.

"6. Nor can a statute be declared unconstitutional merely because in the opinion of the court it violates one or more of the fundamental principles of republican liberty,

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<sup>1</sup> Some courts have intimated that only the superior courts should assume to deny validity to a statute. *Ortman v. Greenman*, 4 Mich. 291. Compare *Muyberry v. Kelly*, 1 Kans. 116. [It is a rule of practice in some States, that a single judge shall never hold a statute invalid. In Rhode Island (Pub. St. R. I., 1882, c. 220), it is provided that in cases before a magistrate or court other than the Supreme Court, on an objection to the constitutionality of a legislative Act, the court or magistrate shall hold the Act valid, and if judgment goes against the party raising this objection, the case shall be certified to the Supreme Court for its decision. An instance of this procedure is found in *Com. v. Amery*, 12 R. I. 64. — Ed.]

unless it shall be found that those principles are placed beyond legislative encroachment by the provisions of the Constitution itself. The principles of republican government are not a set of inflexible rules, vital and active in the Constitution even when unexpressed; but they are subject to variation and modification from motives of policy and public necessity, and it is only in those particulars in which experience has demonstrated that any departure from the settled course must work injustice and confusion, that it is customary to incorporate them in the Constitution in such a way as to make them definite rules of action and decision. The following are illustrations. The principle that taxation and representation go together is important and valuable, and should never be lost sight of in legislation; but, as commonly understood, it can never be applied universally without admitting every person to the elective franchise; for taxes in some form fall upon all, — the rich and the poor, the infant and the adult, the male and the female, and Federal taxes reach the unrepresented Territories as well as the represented States. So the principle that local affairs shall be managed in local districts, and that these shall choose their own local officers, constitutes one of the chief excellencies of our system of government; but in applying it the difficulty is at once encountered of determining what are local concerns and what general; and it may perhaps be found in a given case that the concerns that are set apart as local, if neglected or imperfectly performed, subject the whole State to embarrassment, so that State intervention becomes necessary. And it is obvious that, wherever a recognized principle of free government requires legislation for its practical application and enforcement, the body that passes laws for the purpose must determine, in its discretion, what are the needs of legislation and what its proper limits. The courts cannot take such principles as abstract rules of law, and give them practical force.

"7. When a question of Federal constitutional law is involved, the purpose of the Constitution, and the object to be accomplished by any particular grant of power, are often most important guides in reaching the real intent; and the debates in the Constitutional Convention, the discussions in the *Federalist* and in the conventions of the States, are often referred to as throwing important light on clauses in the Constitution which seem blind or of ambiguous import. We may discover from these what the general drift of opinion was as to the division line between Federal and State power on many subjects, and we can sometimes judge from that whether a particular authority lies on one side of the line or on the other. But we shall be misled if we attempt in this manner to judge of State legislative power when the limitations of the Federal Constitution are not in question. We cannot test the validity of any State statute by a general spirit which is supposed to pervade the State Constitution, but is not expressed in words. Presumptively, when the people of the State, by their Constitution, call into existence a legislative department, and endow it with the function of making laws, they confer upon it the full and complete legislative power, — as full and complete as the people, in the exercise of sovereignty, could themselves have wielded it, — subject only to such restrictions as were by the same instrument imposed. 'The law-making power of the State recognizes no restraints, and is bound by none except such as are imposed by the Constitution. That instrument has been aptly termed a legislative Act by the people themselves, in their sovereign capacity, and is therefore the paramount law. Its object is, not to grant legislative power, but confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute. These limitations are created and imposed by express words, or arise by necessary implication. The leading feature of the Constitution is the separation and distribution of the powers of the government. It takes care to separate the executive, legislative, and judicial powers, and to define their limits. The executive can do no legislative act, nor the legislature any executive act, and neither can exercise judicial authority.' Presumptively, therefore, if an Act of the legislative department is not an encroachment upon executive or judicial power, it is valid. To show its invalidity, it is necessary to point out some particular in which, either in form or substance, it is inconsistent with the Constitution. The inconsistency may consist, either, (1) in the failure to observe some constitutional form which is made essential to a valid enactment, such as the taking of the final vote thereon by yeas and nays when the Constitution requires it; or (2) in the disregard of

an express prohibition, as where it consists in a special charter of incorporation when the Constitution forbids incorporation except under general laws; or (3) in the disregard of some fundamental right declared in the bill of rights, as would be a statute compelling support of sectarian worship or schools when the Constitution proclaims religious liberty. And in all these cases it is not the spirit of the Constitution that must be the test of validity, but the written requirements, prohibitions, and guaranties of the Constitution itself.

"8. A statute may sometimes be valid in part and invalid in other particulars. This often happens under State constitutions that require an Act to contain but one object which shall be expressed in the title. If in such a case the Act embraces two objects while the title expresses but one, the Act will be unconstitutional and void as to the one not so expressed. So in the absence of such a requirement the Act might be void as to one object because the legislation attempted was expressly forbidden by the Constitution, while in other particulars it was plainly within the legislative competency. The general rule therefore is, that the fact that part of a statute is unconstitutional does not justify the remainder being declared invalid also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the Act otherwise than as a whole. It is immaterial how closely the valid and invalid provisions are associated in the Act; they may even be contained in the same section, and yet be perfectly distinct and separable, so that the one may stand though the other fall. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. But if the intent of the Act is to accomplish a single purpose only, and some provisions are void, the whole must fail unless sufficient remains to effect the object without the invalid portion. And if they are so mutually connected with and dependent on each other as conditions, considerations, or compensations, as to warrant the belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions that are thus dependent, conditional, or connected must fall with them.

"9. A doubt of the constitutional validity of a statute is never sufficient to warrant its being set aside. 'It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.' 'It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt.' To be in doubt, therefore, is to be resolved, and the resolution must support the law.

"This course is the opposite to that which is required of the legislature in considering the question of passing a proposed law. Legislators have their authority measured by the Constitution; they are chosen to do what it permits, and nothing more, and they take solemn oath to obey and support it. When they disregard its provisions, they usurp authority, abuse their trust, and violate the promise they have confirmed by an oath. To pass an Act when they are in doubt whether it does not violate the Constitution, is to treat as of no force the most imperative obligations any person can assume. A business agent who would deal in that manner with his principal's business would be treated as untrustworthy; a witness in court who would treat his oath thus lightly, and affirm things concerning which he was in doubt, would be held a criminal. Indeed, it is because the legislature has applied the judgment of its members to the question of its authority to pass the proposed law, and has only passed it after being satisfied of the authority, that the judiciary waive their own doubts, and give it their support.<sup>1</sup>

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[<sup>1</sup> Perhaps more exactly, because it is the duty of the legislature to do this, and

"10. The validity of legislation can never be made to depend on the motives which have secured its adoption, whether these be public or personal, honest or corrupt. There is ample reason for this in the fact that the people have set no authority over the legislators with jurisdiction to inquire into their conduct, and to judge what have been their purposes in the pretended discharge of the legislative trust. This is a jurisdiction which they have reserved to themselves exclusively, and they have appointed frequent elections as the occasions and the means for bringing these agents to account. A further reason is, that to make legislation depend upon motives would render all statute law uncertain, and the rule which should allow it could not logically stop short of permitting a similar inquiry into the motives of those who passed judgment. Therefore the courts do not permit a question of improper legislative motives to be raised, but they will in every instance assume that the motives were public and befitting the station. They will also assume that the legislature had before it any evidence necessary to enable it to take the action it did take.

"11. When a legislative enactment proves to be invalid, it is for all legal purposes as if it had never been. It can support no contract, it can create no right, it can give protection to no one who has acted under it, it can make no one an offender who has refused obedience to it. And this is true of any particular provision of a statute which proves invalid, while the remainder is sustained. It is true that one who assumes to disobey a statute as invalid does so at the risk of being punished for his disobedience if the law is sustained; but this is a risk which every one takes when he acts in any matter in respect to which the law is in doubt."

## II. ADVISORY OPINIONS.

THE giving of such opinions by judges is not an exercise of the judicial function. The relation of the English judges to the king, in former days, and their ancient place as assistants to the House of Lords, led to a practice, on the part of that House, as well as the king, of calling on them for advisory or "consultative" opinions. This may be traced very far back in our records, *e. g.*, in 1387 (2 Stat. Realm, 102-104), King Richard II. puts to his judges a long string of questions.

In this country the constitutions of seven States have provided for obtaining opinions from the judges of the highest court upon application by the executive or the legislature, *viz.*, of Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado, and South Dakota. In one other State, Missouri, a similar clause was introduced in the Constitution of 1865, just after the war; but it continued only ten years, and was left out of the Constitution of 1875. It dates in Massachusetts from 1780, — Part II., c. iii. s. 2; in New Hampshire from 1784, — Part II., title, *Judiciary Power*; in Maine (formerly a part of Massachusetts) from 1820, — Art. VI., s. 3; in Rhode Island, from 1842, — Art. X., s. 3; in Florida, from 1868, — Art. V., s. 16, amended in 1875, — Amendment XI; in Colorado, from 1886, — Amendment to Art. VI., s. 3; in South Dakota, from 1889, — Art. V., s. 13. In the first three States, the judges are to give their opinions "upon important questions of law and upon solemn occasions." In Rhode Island, "upon any question of law, whenever requested," &c. In Florida, at any time, upon the Governor's request "as to the interpretation of any portion of this Constitution, or upon any point of law;" this was amended by limiting the last alternative to "any question affecting his executive powers and duties." In Colorado, the provision reads: "The Supreme Court shall give its opinion upon important questions upon solemn occasions, when required by the Governor, the Senate, or the House of Repre-

because a failure on the part of the legislature to do its duty will not justify the judiciary in trying to mend matters by a breach of its own duty.

Judge Cooley, in another place (Const. Lim., 6th ed.), says: "Cases must sometimes occur when a court should refrain from declaring a statute unconstitutional because not clearly satisfied that it is so, though, if the judges were to act as legislators upon the question of its enactment, they ought, with the same views, to withhold their assent, from grave doubts upon that subject." — ED.]

sentatives: and all such opinions shall be published in connection with the reported decisions of the court." This has been *held* (In the Matter of Senate Bill No. 65, 12 Colo. 466, in 1889) to be limited to questions of law and such as are questions *publici juris*, and to call not merely, as elsewhere generally held, for the opinions of the justices, but for authoritative judgments of the court. The resort to this power in Colorado was prompt and troublesome. See a group of opinions in 9 Col. 620-642. In South Dakota, the Governor may "require the opinions of the judges of the Supreme Court upon important questions of law involved in the exercise of his executive powers, and upon solemn occasions." In Missouri, the provision only varied from that in Massachusetts, by the insertion of a word,—"upon important questions of constitutional law," &c.

In the Federal Convention of 1787, it was proposed that "each branch of the legislature, as well as the supreme executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions." 5 Ell. Deb. 445. But nothing came of it. It is, however, interesting to see that the first President, who had also presided over the Convention, asked for an opinion from the justices. "Washington, in 1793, sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France. They declined to respond. The President and Cabinet came to the conclusion to ask this opinion from the judges on July 12, 1793. Those who were at hand appear to have suggested delay until they could communicate with their absent associates. A letter of July 23, from the President to Chief Justice Jay and his brethren, is preserved, in which he assents to this delay, but expresses the pleasure that he shall have in receiving the opinion at a convenient time. (Spark's Washington, X. 359.) The date was but a little later,—not far from Aug. 1, as it would seem,—of which Marshall speaks when he says (Life of Washington, V. 441, Philadelphia, 1807): 'About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the Executive. Considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them.' It was, perhaps, fortunate for the judges and their successors that the questions then proposed came in so formidable a shape as they did. There were twenty-nine of them, and they fill three large octavo pages in the Appendix to the tenth volume of Spark's Washington. Had they been brief and easily answered the court might, not improbably, have slipped into the adoption of a precedent that would have engrafted the English usage upon our national system. As it is, we may now read in 2 Story, Const. sec. 1571, that while the President may require the written opinion of his Cabinet, 'he does not possess a like authority in regard to the judicial department.'" — THAYER'S *Mem. on Advisory Opinions*, 13.

It may be added that the Constitution of the Hawaiian Islands of 1887, Art. 70 (5 Haw. Rep. 716), gives "the King, His Cabinet, and the Legislature . . . authority to require the opinions of the justices of the Supreme Court upon important questions of law, and upon solemn occasions." This provision is said to run back through the Constitution of 1864 (art. 70) to that of 1852 (art. 88), where it seems to have been first introduced, in a slightly different form. A number of such opinions are preserved in the Hawaiian Reports, beginning with one entitled *The Segregation of Lepers*, 5 Haw. Rep. 162 (May, 1884). — Ed.

## GREEN v. THE COMMONWEALTH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[12 *Allen*, 155.]*Reed*, Attorney-General, for the Commonwealth.*H. W. Paine*, and *N. St. J. Green*, for the petitioner.

BIGELOW, C. J. The petitioner in this case stands convicted upon his own confession in open court of the crime of murder in the first degree, and is now awaiting the execution of sentence of death awarded against him on such conviction at a term of this court for the county of Middlesex, held at the city of Lowell, on the third Monday of April, 1864. Under the provisions of Gen. St. c. 146, § 13, he made application by petition to a "justice of this court on the 21st day of March last, for a writ of error on said judgment." His petition is accompanied by an assignment of certain errors, which he alleges to exist in the record. With the assent of counsel, who appear in his behalf, and in conformity to the precedent established in *Webster v. The Commonwealth*, 5 Cush. 386, the hearing of this petition was adjourned into the full court. The grounds upon which the alleged errors are supposed to rest have been presented to our consideration with great fulness and ability by learned counsel, and the case now stands for our final adjudication on the causes of error assigned in support of the petition. It is hardly necessary for us to say that we have considered the questions thus brought before us with the most anxious solicitude, and that we have examined and deliberated upon them under a deep sense of the responsibility which rests upon us, in view of the solemn and momentous consequences to the petitioner involved in our decision.

But it is not for this reason only that we have been earnest in our desire to weigh with the utmost candor and impartiality the causes of error assigned by him. Some of the points now relied on as affording sufficient ground for a reversal of the judgment against him have been heretofore called to our attention. By an order of the Governor and Council passed on the 31st day of October, 1864, in pursuance of the provision of the Constitution, c. 3, § 2, the inquiry was propounded to us "whether it was competent for this court, especially when held by a single justice, to enter up a final judgment against a prisoner, and award the sentence of death, upon his own plea of guilty of murder in the first degree; or whether, on the contrary, it is not necessary to record the plea as a general plea of guilty, and either enter judgment as of murder in the second degree, or else submit the question of the degree of murder to be found by a jury." To this inquiry, in compliance with the duty imposed by the Constitution, an answer, signed by all the justices of this court, covering, as we then supposed, the entire subject-matter concerning which information was sought, was returned to the Governor and Council, which stated in substance that the convic-

tion was not irregular or informal on the grounds which were understood to be suggested by the inquiry; and that the judgment and sentence were duly entered up and recorded. 9 Allen, 585. The opinion thus given, like all others of a similar character, was formed without the aid of counsel learned in the law, or any statement of the reasons on which the regularity or validity of the proceedings had been called in question. Although it is well understood and has often been declared by this court that an opinion formed and expressed under such circumstances cannot be considered in any sense as conclusive or binding on the rights of parties, but is regarded as being open to reconsideration and revision, yet it necessarily presupposes that the subject to which it relates has been judicially examined and considered, and an opinion formed thereon. We have therefore felt it to be our duty most sedulously to guard against any influence which might flow from our previous consideration of some of the causes of error now assigned as the ground for a reversal of the judgment. . . .

The result is, that the prayer of the petitioner is denied.

The prisoner was accordingly hung.

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### OPINION OF THE JUSTICES.

THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[126 Mass. 557.]

. . . THE Justices of the Supreme Judicial Court, having now fully considered the questions upon which their opinions have been required by the Honorable Senate and the Honorable House of Representatives respectively, and the precedents communicated to them by the joint order of the two Houses, and other precedents and authorities on the subject, respectfully submit the following opinion:

The Constitution of the Commonwealth provides as follows: "All money bills shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills." Chap. 1, sect. 3, art. 7.

The questions proposed by the two Houses, although differing in form, appear to us to present substantially one and the same question; namely, whether a bill which appropriates money from the treasury of the Commonwealth, and does not provide for levying such money upon the people, by tax or otherwise, is a money bill, which must, by this provision of the Constitution, originate in the House of Representatives.

Upon first taking up this question, some of us had doubts whether it was one upon which we could properly express an opinion. Although a consideration of the precedents dispelled those doubts, it has seemed



to us proper, in order to show that, in undertaking to define the constitutional authority of a branch of the legislature, we have been cautious not to exceed our own, that we should state the reasons on which it has appeared to us to be our duty to answer the question to the best of our information and abilities.

The question is indeed, in one aspect, a question of parliamentary privilege and of parliamentary procedure; but it is also a question of the construction of the Constitution of the Commonwealth, which is on this subject the supreme law.

The Constitution declares that "each branch of the legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the Supreme Judicial Court upon important questions of law and upon solemn occasions." Chap. 3, art. 2. This article, as reported in the Convention that framed the Constitution, limited the authority to the Governor and Council and the Senate, and was extended by the Convention so as to include the House of Representatives; Journal of Convention of 1779-80 (ed. 1832), 211, 242; and, as may be inferred from the form in which it was originally presented, evidently had in view the usage of the English Constitution, by which the king, as well as the House of Lords, whether acting in their judicial or in their legislative capacity, had the right to demand the opinions of the twelve judges of England.

The practice of the Stuart kings, in taking extrajudicial opinions of the judges upon questions about to come before them judicially, was an unconstitutional abuse of the royal authority in this respect. *Stafford's Case*, Year-Book, 1 H. VII. fol. 26, pl. 1; Lord Coke, in *Peacham's Case*, 2 Howell's State Trials, 871; 3 Inst. 29; Foster's Crown Law, 200; Co. Lit. 110, Hargrave's note. But, since the Revolution of 1688, so sturdy an assertor of the independence of the judges as Lord Holt joined with the other judges of the time in opinions to King William III. upon the extent of the power of pardon; *Fenwick's Case*, Fortescue, 385; and to Queen Anne upon the question whether a writ of error should be granted as of right; *Paty's Case*; 14 East. 92, note; 14 Howell's State Trials, 861, note. And, as late as 1760, Lord Mansfield, Chief Justice Willes, and other judges, gave an opinion to King George III. upon the jurisdiction of a court-martial to try an officer, after his dismissal from the army, for a military offence committed while in actual service. *Lord George Sackville's Case*, 2 Eden, 371. So, under the Constitution of the Commonwealth, opinions have been given by the justices of the Supreme Judicial Court to the Governor and Council upon questions of the exercise of the power of pardon, 13 Gray, 618, the issue of death-warrants, 11 Cush. 604, the validity of the proceedings of a court-martial, 3 Cush. 586, and the authority of the Governor, as commander-in-chief, over the militia. 1 Allen, 197, note.

We are not aware of any instance since 1760 in which the Crown has exercised the power of asking the opinion of the judges. But the

right of the House of Lords to put abstract questions of law to the judges, the answer to which might be necessary to the House in its legislative capacity, has been often acted on in modern times. *M'Naghten's Case* (1843), 10 Cl. & Fin. 200, 212-214. . . .

In this Commonwealth, the privileges of the two Houses do not, as in England, rest merely upon legislative resolves and usages; but they are defined by the written Constitution. *Burnham's Case*, 14 Gray, 226, 238; *Whitcomb's Case*, 120 Mass. 118, 122. The same Constitution which defines these privileges declares that each branch of the legislature, as well as the Governor and Council, shall have authority to require the opinions of the justices of the Supreme Judicial Court upon important questions of law and upon solemn occasions. The opinions of the justices can be required only "upon important questions of law," not upon questions of fact; *Opinion of Justices*, 120 Mass. 600; "and upon solemn occasions," that is to say, when such questions of law are necessary to be determined by the body making the inquiry, in the exercise of the legislative or executive power intrusted to it by the Constitution and laws of the Commonwealth. *Answer of Justices*, 122 Mass. 600. No other limit of the authority to require the opinions of the justices is expressed in the Constitution. In giving such opinions, the justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity.<sup>1</sup> . . .

The interesting character of the precedents to which we have referred, and the want of any published collection in which they may be readily found, may, we trust, excuse the fulness with which we have stated the considerations which have satisfied us that the orders of the Senate and of the House of Representatives present an important question of law, arising upon a solemn occasion, and upon which the two Houses are empowered by the Constitution to require our opinion. Any embarrassment that we might have felt in giving an opinion to one House upon a question affecting the constitutional powers of both has been removed by the facts that each House has proposed a similar

<sup>1</sup> It has been sometimes asked, whether the opinions of the judges ought not to govern the decision of the House. They have never had that effect even when unanimous; and it is not easy to see how they could so operate when conflicting and opposed. The House pays great regard to the opinions of the judges, especially when concurrent; but the House cannot transfer to others the constitutional responsibility which attaches to the adjudication of causes in the court of last resort. — *MACQUEEN, Appellate Jurisd. of the House of Lords*, 49-50.

This is the first time, since the adoption of the Constitution, that this question has been brought *judicially* to the attention of the court. The advice, or opinion, given by the judges of this court, when requested, to the Governor, or to either House of the General Assembly, under the 3d section of the 10th article of the Constitution, is not a *decision* of this court; and given, as it must be, without the aid which the court derives, in adversary cases, from able and experienced counsel, though it may afford much light, from the reasonings or research displayed in it, can have no weight as a precedent. — *AMES, C. J.* (for the court), in *Taylor v. Place*, 4 R. I. 362 (1856). — *ED.*

question and that the two Houses have joined in an order transmitting to us all the precedents that either House deemed of sufficient importance to be considered. . . .

The result is, that, having regard to the history of the subject, to the settled meaning of the words "money bills" at the time of the adoption of the Constitution of the Commonwealth, and to the contemporaneous construction of that Constitution by the justices of the Supreme Judicial Court and by both Houses of the Legislature, affirmed by a continuous and uniform practice of eighty-five years, we are of opinion that the exclusive constitutional privilege of the House of Representatives to originate money bills is limited to bills that transfer money or property from the people to the State, and does not include bills that appropriate money from the treasury of the Commonwealth to particular uses of the government, or bestow it upon individuals or corporations. . . .

HORACE GRAY,	MARCUS MORTON,
JAMES D. COLT,	WILLIAM C. ENDICOTT,
SETH AMES,	OTIS P. LORD,
AUGUSTUS L. SOULE.	

BOSTON, December 31, 1878.

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#### IN THE MATTER OF THE APPLICATION OF THE SENATE.

SUPREME COURT OF MINNESOTA. 1865.

[10 Minn. 78.]

AT a session of the Legislature of this State in 1865, the following resolution was adopted by the Senate, to wit:

*Resolved*, That the Supreme Court be and they are hereby respectfully requested to furnish the Senate their opinion upon the following questions. . . .

Whereupon the court, in answer to such resolution, returned to the Senate the following opinion.

BY THE COURT (McMILLAN, J.). A copy of the resolution of the Senate requesting the Supreme Court to furnish the Senate with their opinion upon certain questions stated in the resolution was communicated to the court yesterday.

We have had the matter under advisement, and given it that consideration which a communication from so high a source is entitled to receive.

The resolution, we presume, was passed in view of sec. 15, ch. 4, Comp. Stat., which provides that "either House may, by resolution, request the opinion of the Supreme Court, or any one or more of the judges thereof, upon a given subject, and it shall be the duty of such court or judges when so requested, respectively, to give such opinion in writing."

We are aware of but two instances under our State organization, in which similar resolutions have been passed, and in both cases replies were made declining to express any opinion upon the points submitted. *Journal of the Senate*, 1858, 718; *Ib.* 1863, 75.

We might be justified in resting on these precedents. But we perceive that in neither case was the resolution considered by all the members of the court; nor does either of the opinions given by the judges cover the whole ground of the power of the legislature and the court under resolutions of this kind. We, therefore, deem it proper out of respect to the Senate, and in view of the important principles involved, to state briefly the reasons for the conclusions at which we have arrived.

By the Constitution the power of the State government is divided into three distinct departments, legislative, executive, and judicial. The powers and duties of each department are distinctly defined. The departments are independent of each other to the extent, at least, that neither can exercise any of the powers of the others, not expressly provided for. Constitution, art. 3, sec. 1.

This not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the others not within the scope of its jurisdiction; and "it is the duty of each to abstain from and to oppose encroachments on either." Any departure from these important principles must be attended with evil.

This question is well considered in a note to *Hayburn's Case*, 2 Dall. 409 *et seq.*, in which the Circuit Court for the District of New York,<sup>1</sup> Jay, Chief Justice, says: "That neither the legislative nor the executive branches can constitutionally assign to the judicial, any duties but such as are properly judicial and to be performed in a judicial manner."

The duty sought to be imposed by the section of the Act referred to, is clearly neither a judicial act nor is it to be performed in a judicial manner. It constitutes the Supreme Court the advisers of the legislature, nothing more. This does not come within the provisions of the Constitution, and, as the Constitution now stands, would be, in our opinion, not only inconsistent with judicial duties, but a dangerous precedent. The impropriety of an unauthorized expression of opinion by a judge or court, especially one of last resort, upon a matter which may subsequently come before the court for adjudication, will immediately suggest itself. If the statute under consideration is in conflict with the Constitution it imposes no duty, and any opinion expressed in pursuance of action under it is extra-judicial, and no official responsibility attaches to the judge or court voluntarily giving it. The evils which might result to the people from such a source will suggest themselves on a moment's reflection.

In all the instances to which we have had an opportunity of referring, where courts have responded to resolutions of this character in other

<sup>1</sup> See *ante*, p. 105, n. — ED.

States, provision has been made therefor in the State Constitution. Const. of Mass. ch. 3, sec. 2; Const. of New Hampshire, sec. 74; and of course in such case official responsibility attaches to the discharge of the duty, and thus one serious objection is removed. Although we confess that, for other reasons, such a constitutional provision does not address itself to our minds with any favor.

Whether under the territorial organization the statute referred to could have been sustained, we need not consider, since only such territorial laws as are not inconsistent with the Constitution, are preserved by the schedule to that instrument.

We are, therefore, unanimously of opinion that the section referred to authorizing the action of the Senate is unconstitutional and void, and therefore imposes no duty on the court. And we are prevented from voluntarily complying with the request, by the views we entertain of our judicial duty and the injurious tendency of such a precedent.

We must, therefore, respectfully decline to comply with the request contained in the resolution.<sup>1</sup>

<sup>1</sup> A statute similar to that declared unconstitutional in Minnesota, is found in Vermont (Rev. St. Vt. (1880) § 795): "The Governor, when the interests of the State demand it, may require the opinion of the judges of the Supreme Court or a majority of them upon questions of law connected with the discharge of his duties." So in New York, by a provision first introduced in 1829 (2 Rev. St., ed. 1829, 658; Part iv. tit. 1, §§ 13, 14), when a person was convicted and sentenced to death, the presiding judge was required to inform the Governor and to send to him the judge's notes of the testimony; whereupon the Governor might "require the opinion of the Chancellor, the justices of the Supreme Court, and of the Attorney-General, or of any of them, upon any statement so furnished." A case in which an opinion was given under this statute is *People v. Green*, 1 Denio, 614 (1845). By a statute of 1847, the judges of the Court of Appeals were substituted for the Chancellor; and the law so stands now. (N. Y. Code Crim. Proc. §§ 493, 494.)

Without any such statute, and without any constitutional requirement, the judges have sometimes been called on for such extra-judicial advice and aid, and have given it. There are indications that this was done, more or less, during the colonial period, — as in the expressions of Mr. Justice Howell (*ante*, p. 76) in the Rhode Island case of *Trevett v. Weeden* in 1786. On February 25, 1780, the Constitutional Convention of Massachusetts voted "to signify to the judges of the Superior Court in writing the request of this Convention that they would give their attendance this evening, as matters of importance are to be acted on." (Journal of Conv. of 1779–80, 142.) In Pennsylvania (Archives, vols. 8, 11, and 12) there are various instances of opinions given by the justices to the executive department between 1780 and 1790. An account of such an opinion is found in *Respublica v. De Longchamps*, 1 Dall. 111, 115–116 (1784); and an opinion or "report" is found in 3 Binney, Appendix, 598 (1808). For other like opinions, given upon request, without any legal requirement, see Jameson, Const. Conv., 4th ed. 663 (in New York), *In re Power of the Governor*, 79 Ky. 621 (1881), and 55 N. W. Rep. 1092 (Nebraska, 1893). In this last case, Norval, J., gives strong reasons for refusing to join with his brethren in giving the opinion. It seems to have been not an uncommon practice in Nebraska to give them.

In England the judges are sometimes called upon to exercise what is there called a "consultative" function; but its non-judicial quality is distinctly asserted. *Ex parte Co. Council of Kent* [1891], 1 Q. B. 725; compare *Overseers v. L. & N. W. R'y. Co.*, 4 App. Cas. 30. — Ed.

## HOUSTON v. WILLIAMS.

SUPREME COURT OF CALIFORNIA. 1859.

[13 Cal. 24.]

APPEAL from the Third District.

This was an action of ejectment. The defendant recovered judgment in the District Court. On appeal, the judgment was reversed by the Supreme Court from the bench—no opinion in writing being delivered. The reasons for the decision were stated orally. The counsel for the plaintiff afterwards presented a petition asking the court to file a written opinion.

*Wm. T. Wallace*, for petitioner.

*Spencer & Rhodes*, for respondent.

FIELD, J., delivered the opinion of the court—TERRY, C. J., concurring.

At the present term the judgment in this case was reversed, without any opinion being given setting forth the reasons for the reversal. The appellant now moves the court to file an opinion, and cites section 69 of the statute of May 15th, 1854, amending the Practice Act, which provides that "all decisions given upon an appeal in any Appellate Court of this State, shall be given in writing, with the reason therefor, and filed with the clerk of the court," except in cases tried in the County Court, on appeal from a justice's court.

The provisions of the statute had not been overlooked when the decision was rendered. It is but one of many provisions embodied in different statutes by which control over the judiciary department of the government has been attempted by legislation. To accede to it any obligatory force, would be to sanction a most palpable encroachment upon the independence of this department. If the power of the legislature to prescribe the mode and manner in which the judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?

The truth is, no such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties, this court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The legislature can no more require this court to state the reasons of its decisions, than this court can require, for the validity of the statutes, that the legislature

shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases, in which opinions were never delivered. The facts are stated by the reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the courts, in the instances mentioned, were discharging their entire constitutional obligations. (See, by way of illustration, cases in 1 Day's Conn. Reports; in 1 Brockenborough's Va. Cases; and in 4 Harris & McHenry's Maryland Reports.)

The practice of giving the reasons in writing for judgments, has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the judges, and taken down by the reporters in short-hand. 1 Blackstone, 71.

In the judicial records of the King's Courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and, in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini Libri*, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence; and this is also worthy for learned and grave men to imitate." Coke's Rep., part 3, pref. 5.

The opinions of the judges, setting forth their reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law which govern the court, and should guide litigants; and right-minded judges, in important cases — when the pressure of other business will permit — will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion, the authority of the court is absolute. The legislative department is incompetent to touch it.

With the expression of these views, we might close this opinion, by denying the motion, but it will not be impertinent to the matter under consideration, to say a few words as to the control of the court over its opinions and records. There are some misapprehensions on the subject, arising chiefly from a confusion of terms, and from a misconception of the relation of the different departments of government to each other, and the entire independence in its line of duties of the

judiciary. The terms "opinions" and "decisions" are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinion, has been sometimes regarded as a mutilation of a record. A decision of the court is its judgment; the opinion is the reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing, or a modification. The latter is the property of the judges, subject to their revision, correction, and modification, in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records. In the haste of composition, some errors will occur; in the copying, several; in the printing, many. There will also be, at times, expressions of opinion on incidental questions, too strong and unqualified. All these errors, whether in language, form, or substance, should be corrected before a publication is permitted, as an authoritative exposition of the law, and, as such, binding upon the court. The power of enforcing a correct publication, when the publication is authorized, cannot reasonably be denied. In no civilized State, except in California, has the existence of this power ever been doubted. Every judge, from the Chief Justice of the Supreme Court of the United States, down, claims and exercises, without question, the right of revision, including thereby modification and partial suppression of his opinions. In the recent case in relation to the Sutter grant, we are informed that application was made for a copy of the opinion delivered, and that the application was refused, on the ground that Mr. Justice Campbell, who delivered it, wished to revise it before it left the clerk's office. When the opinions have been revised and finally approved and recorded, then they cease to be the subject of change. They then become like judgment records, and are beyond the interference of the judges, except through regular proceedings before the court by petition.

The records of the courts are necessarily subject to the control of the judges, so far as may be essential to the proper administration of justice. The court hears arguments upon its records; it decides upon its records; it acts by its records; its openings, and sessions, and adjournments, can be proved only by its records; its judgments can only be evidenced by its records; in a word, without its records it has no vitality. Legislation, which could take from its control its records, would leave it impotent for good, and the just object of ridicule and contempt. The clerk, it is true, is a constitutional officer — not subject to appointment or removal by the court — but subject, in the control of the records, to its orders. It is true the court cannot, without great abuse of its powers, take, directly or indirectly, from the clerk, the perquisites of his office for copies of opinions, and papers on file, nor authorize the destruction or mutilation of any of the records, but, subject to these limitations, it must necessarily exercise control that justice may be done to litigants before it.



The power over our opinions and the records of our court we shall exercise at all times while we have the honor to sit on the bench, against all encroachments from any source, but in a manner, we trust, befitting the highest tribunal in the State. We cannot possibly have any interest in the opinions except that they shall embody the results of our most mature deliberation, and be presented to the public in an authentic form, after they have been subjected to the most careful revision.

*Motion denied.*<sup>1</sup>

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IN RE SANBORN.

SUPREME COURT OF THE UNITED STATES. 1892.

[148 U. S. 222.]

THE case is stated in the opinion.

*Mr. George A. King* (with whom were *Mr. Charles King* and *Mr. William B. King* on the brief), for petitioner.

*Mr. Assistant Attorney-General Maury* opposing.

MR. JUSTICE SHIRAS delivered the opinion of the court.

A claim of John B. Sanborn, presented in the Department of the Interior, for certain fees under a contract with Sisseton and Wahpeton Indians, of ten per cent of the amount appropriated for said Indians by section 27 of the Indian Appropriation Act of March 3, 1891, 26 Stat. 989, c. 543, was referred by the Secretary of that Department, with the consent of the claimant, to the Court of Claims, in pursuance of § 12 of the Act of March 3, 1887, 24 Stat. 505, c. 359; 1 Sup. Rev. Stat. 2d ed. 561. That court having concluded that Sanborn was not entitled to recover, and having reported its findings of fact and conclusions of law to the department, Sanborn, on the 6th day of July, 1892, asked for the allowance of an appeal to the Supreme Court of the United States. This application, being made in a vacation of the Court of Claims, was heard and denied by the Chief Justice, but was renewed and argued before all the judges on November 2, 1892, and was denied by the court, which adopted the opinion of the Chief Justice previously filed upon the motion before him.

Thereupon Sanborn filed, in this court, his petition praying that a writ of *mandamus* be allowed to the Chief Justice and judges of the Court of Claims, commanding them to allow his appeal as prayed for.

The question for us to answer is whether, where a claim or matter is pending in one of the executive departments, which involves controverted questions of fact or law, and the head of such department, with

<sup>1</sup> In *Ex parte Griffiths*, Reporter, 118 Ind. 83 (1888), it was held beyond the power of the legislature to require the judges of the Supreme Court to write headnotes for their opinions. — Ed.

the consent of the claimant, has transmitted the claim, with the vouchers, papers, proofs and documents pertaining thereto, to the Court of Claims, and that court has reported its findings of fact and law to the department by which it was transmitted, the claimant has a right by appeal to bring the action of that court before us for review.

The petitioner does not complain of any illegality on the part of the court below in dealing with his claim. He concedes that the action of that court had been invoked with his consent. What he complains of is the refusal of the court to allow his appeal; and we learn, from the opinion of the court, that its refusal to allow the appeal was not put upon any irregularity or defect in the claim, or in the application for the allowance of an appeal, but upon its view that the proceedings before it were not the subject of appeal to this court.

We must find an answer to the question thus put to us by a construction of the Act of March 3, 1887, read in the light of the previous legislation establishing the Court of Claims, and regulating the subject of appeals from its judgments to this court.

This subject came, for the first time, before this court in the case of *Gordon v. The United States*, 2 Wall. 561, wherein it was held that, as the law then stood, no appeal would lie from the Court of Claims to this court. The reasons for this conclusion are stated in the opinion of Chief Justice Taney, reported in the appendix to 117 U. S. 697, and interesting as his last judicial utterance. Briefly stated, the court held that as the so-called judgments of the Court of Claims were not obligatory upon Congress or upon the executive department of the government, but were merely opinions which might be acted upon or disregarded by Congress or the departments, and which this court had no power to compel the court below to execute, such judgments could not be deemed an exercise of judicial power, and could not, therefore, be revised by this court.

A similar question arose in this court as early as 1794, in the case of the *United States v. Yale Todd*, an abstract of which case appears in a note by Chief Justice Taney to the later case of the *United States v. Ferreira*, 13 How. 52, and wherein it was held that an Act of Congress conferring powers on the judges of the Circuit Court to pass upon the rights of applicants to be placed upon the pension lists, and to report their findings to the Secretary of War, who had the right to revise such findings, was not an Act conferring judicial power, and was, therefore, unconstitutional.<sup>1</sup>

The case of the *United States v. Ferreira* was that of an appeal from the District Court of the United States for the District of Florida. The judge of that court had acted in pursuance of certain Acts of Congress, directing the judge to receive, examine and adjust claims for losses suffered by Spaniards by reason of the operations of the American army in Florida. It was decided that the judge's decision was not

<sup>1</sup> *Seem*, an error. See *ante*, p. 105 n. — Ed.

the judgment of the court, but a mere award, with a power to review it conferred upon the Secretary of the Treasury, and that from such an award no appeal could lie to this court.

Afterwards, and perhaps in view of the conclusion reached by this court in these cases, on March 17, 1866, 14 Stat. 9, c. 19, Congress passed an Act giving an appeal to the Supreme Court from judgments of the Court of Claims, and repealing those provisions of the Act of March 3, 1863, which practically subjected the judgments of the Supreme Court to the re-examination and revision of the departments, and since that time no doubt has been entertained that the Supreme Court can exercise jurisdiction on appeal from final judgments of the Court of Claims. *United States v. Alire*, 6 Wall. 573; *United States v. O'Grady*, 22 Wall. 641; *United States v. Jones*, 119 U. S. 477.

Express provision for such appeals was made by section 707 of the Revised Statutes, as follows: "An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff, in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court."

Additions were made to the statutory law on this subject by the Act of March 3, 1887, 24 Stat. 505, c. 359 (1 Sup. Rev. Stat. 2d ed. 559), the 9th section of which is as follows: "That the plaintiff or the United States, in any suit brought under the provisions of this Act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that case made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects and as near as may be to the statutes and rules of court governing appeals and writs of error in like causes."

The 12th section of the statute is in the following words: "That when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court shall adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted."

With these statutory provisions and decisions of the Supreme Court before it, the court below held that a finding of fact and law made, at the request of a head of a department, with the consent of the claimant, and transmitted to such department, is not a judgment within the meaning of the 9th section of the Act of March 3, 1887, or of the 707th section of the Revised Statutes, and is not, therefore, appealable to this court.

Such a finding is not made obligatory on the department to which it

is reported — certainly not so in terms, — and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made, by the statute, the final and indisputable basis of action either by the department or by Congress.

It is, therefore, within the scope of the decision in *Gordon v. United States*. The provisions providing for appeals, in the 9th section of the Act of 1887, have reference to cases under the prior sections of the Act which treat of cases or suits brought against the United States, whether in the District Courts, Circuit Courts, or Court of Claims, and wherein final judgments or decrees shall be entered. This seems to be clear from the terms used — “the plaintiff or the United States, in any suit brought under the provisions of this Act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the limitations and conditions therein contained.” The reference here is to the 707th section of the Revised Statutes, which, as already said, provides for an “appeal to the Supreme Court on behalf of the United States, from all judgments of the Court of Claims, adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars.”

In the case before us there was, as held by the Court of Claims, no final judgment obligatory upon the Department of the Interior, or enforceable by execution from any court. Moreover, there was really no suit to which the United States were parties. The claimant did not pretend that the government owed him anything for property sold or services rendered. His effort was to get the Department of the Interior, which was paying money over to Indians under treaties, to withhold from them an agreed percentage thereof for services rendered by him to the Indians. While such a claim may be rightfully regarded as a matter pending in one of the executive departments, which involves controverted questions of fact or law, within the meaning of the 12th section of the Act of 1887, we are unable to regard it as a suit brought against the United States, within the contemplation of the 9th section of that Act. It is true that, by several statutes which appear in a compendious form in sections 2103, 2104 and 2105 of the Revised Statutes, the form and substance of contracts between Indians and agents or attorneys, for services to be performed in reference to claims by such Indians against the United States, are prescribed, and the approval of such contracts by the Secretary of the Interior and the Indian Commissioner is made necessary. But such enactments, intended to protect the Indians from improvident and unconscionable contracts, by no means create a legal obligation on the part of the United States to see that the Indians perform their part of such contracts.

Section 2104 provides that “the Secretary of the Interior and Com-

missioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and if not, it shall be paid in proportion to the services rendered under the contract."

Such a claim may be, as already said, a matter pending in the Department of the Interior, within the meaning of the 12th section of the Act of 1887, but it is plainly not a suit against the United States, with respect to which an appeal is provided for by the 9th section.

The application for a writ of *mandamus* must, therefore, be

*Denied.*<sup>1</sup>

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LUTHER v. BORDEN.

SUPREME COURT OF THE UNITED STATES. 1848.

[7 How. 1.]

THE first of these cases came up by a writ of error, the second upon a certificate of division of opinion by the judges of the Circuit Court of the United States for the District of Rhode Island. The first case is stated in the opinion of the court. The second requires no statement, as it went off for want of jurisdiction.

*Hallett and Clifford*, for the plaintiff.

*Webster and Whipple*, *contra*.

TANEY, C. J., delivered the opinion of the court.

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and others, the defendants, in the Circuit Court of the United States for the District of Rhode Island, for breaking and entering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different

<sup>1</sup> The Court of Claims declined to go behind the treaty of 1846 upon the ground that it was not within the province of a court, either of law or equity, to determine that a treaty or an Act of Congress had been procured by duress or fraud, and declare it inoperative for that reason. *Fletcher v. Peck*, 6 Cranch, 87, 130; *Ex parte McCordle*, 7 Wall. 506, 514; *People v. Draper*, 15 N. Y. 545, 555; *Railroad Company v. Cooper*, 33 Penn. St. 278; *Wright v. Defrees*, 8 Indiana, 302.

And while it was conceded that Congress might confer upon that court extra-judicial powers, yet the court was of opinion that this could not be held to have been done by the Act authorizing the institution of this suit, since it was therein provided that whatever judgment might be rendered, whether for the complainants or defendants, might be appealed to the Supreme Court, whose jurisdiction, as defined by the Constitution, was strictly judicial, and could neither be enlarged nor diminished by legislative authority. *Gordon v. United States*, 2 Wall. 561; Taney, C. J., 117 U. S. 697, Appx.; *In re Sanborn*, ante, 222. — FULLER, C. J. (for the court) in *U. S. v. Old Settlers*, 148 U. S. 466. — ED.

parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible. The plaintiff replied, that the trespass was committed by the defendants of their own proper wrong, and without any such cause; and upon the issue joined on this replication, the parties proceeded to trial. . . . [The case involved the question which of two organizations was the legal government of Rhode Island.]

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by

the Act of February 28, 1795, provided that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this Act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the Governor, before he can act. The fact that both parties claim the right to the government, cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the Act of Congress.

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging—if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the Governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere: and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed Constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been

assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the Act of Congress to the sovereign States of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals.

A question very similar to this arose in the case of *Martin v. Mott*, 12 Wheat. 29-31. The first clause of the first section of the Act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State government. The power given to the President in each case is the same, with this difference only, that it cannot be exercised by him in the latter case, except upon the application of the legislature or executive of the State. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said that "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and, we think, are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the President, in exercising this power, shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it. . . .

Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged



to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the Federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

The judgment of the Circuit Court must, therefore, be affirmed.<sup>1</sup>

<sup>1</sup> And so *Cesar Griffin's Case*, Chase's Dec. 364, 412 (1869); and, as to the continued existence of an Indian tribe, *United States v. Holliday*, 3 Wall. 407, 419.

See *Martin v. Mott*, 12 Wheat. 19, and compare *Opinion of Justices*, 8 Mass. 548.

In *Com. of Kentucky v. Dennison, Governor of Ohio*, 24 How. 66 (1860), on an application to the Supreme Court of the United States for a writ of *mandamus* to the defendant to compel the delivery of an alleged fugitive from justice, charged with assisting the escape of a fugitive slave, the court denied the application. In the course of the opinion of the court, Taney, C. J., said: "The demand being thus made, the Act of Congress declares that 'it shall be the duty of the executive authority of the State' to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. . . . But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him. And upon this ground the motion for the *mandamus* must be overruled." — Ed.

STATE OF MISSISSIPPI v. ANDREW JOHNSON, PRESIDENT  
OF THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1866.

[4 Wall. 475.]

THIS was a motion made by *Messrs. Sharkey and R. J. Walker*, on behalf of the State of Mississippi, for leave to file a bill in the name of the State praying this court perpetually to enjoin and restrain Andrew Johnson, a citizen of the State of Tennessee and President of the United States, and his officers and agents appointed for that purpose, and especially E. O. C. Ord, assigned as military commander of the district where the State of Mississippi is, from executing or in any manner carrying out two Acts of Congress named in the bill, one "An Act for the more Efficient Government of the Rebel States," passed March 2, 1867, notwithstanding the President's veto of it as unconstitutional, and the other an Act supplementary to it, passed in the same way March 23, 1867; Acts commonly called the Reconstruction Acts. . . .

The bill set out the political history of Mississippi so far as related to its having become one of the United States; and "that forever after it was impossible for her people, or for the State in its corporate capacity, to dissolve that connection with the other States, and that any attempt to do so by secession or otherwise was a nullity;" and she "now solemnly asserted that her connection with the Federal government was not in anywise thereby destroyed or impaired;" and she averred and charged "that the Congress of the United States cannot constitutionally expel her from the Union, and that any attempt which practically does so is a nullity." . . .

It then charged that, from information and belief, the said Andrew Johnson, President, in violation of the Constitution, and in violation of the sacred rights of the States, would proceed, notwithstanding his vetoes, and as a mere ministerial duty, to the execution of said Acts, as though they were the law of the land, which the vetoes prove he would not do if he had any discretion, or that in doing so he performed anything more than a mere ministerial duty; and that with the view to the execution of said Acts he had assigned General E. O. C. Ord to the command of the States of Mississippi and Arkansas.

Upon an intimation made a few days before by Mr. Sharkey, of his desire to file this bill, the Attorney-General objected to it *in limine*, as containing matter not fit to be received. The Chief Justice then stated that while as a general thing a motion to file a bill was granted as of course, yet if it was suggested that the bill contained scandalous or impertinent matter, or was in other respects improper to be received, the court would either examine the bill or refer it to a master for examination. The only matter, therefore, which would now be considered was the question of leave to file the bill.

*Messrs. Sharkey, R. J. Walker, and Garland*, by briefs filed. . . .

*Mr. Stanbery, A. G., contra.* . . .

Now, I beg attention to the cases upon which the counsel rely, not as in point, but as in close analogy; and, first of all, is what was decided in the case of Burr, by Chief Justice Marshall. In the course of the prosecution against Colonel Burr, his counsel deemed it necessary that they should have possession of a certain letter written to the then President, Mr. Jefferson, by General Wilkinson. It did not exactly appear whether it was a private letter or an official letter, but it was said to be a letter in the possession of the President. The counsel of Colonel Burr moved for a subpoena to be issued by the court to the President, commanding him to appear and bring with him that paper. The question was argued by the counsel for the United States, and by the counsel for Colonel Burr; and, although the counsel for the United States did not admit that such process could be issued against the President, they waived the point, and the whole argument was upon the right of the party to have the paper itself. They got upon that side issue, and did not argue, but merely stated the other point, that, according to their idea, a subpoena could not issue against the President. However, when Chief Justice Marshall came to decide the matter, undoubtedly he was of opinion that a subpoena might issue against the President, as President, to produce a paper in his possession as President. Counsel in this case argue from that, if the President is liable to the process of the court by subpoena to testify, he is liable to the process and the action of the court as a party to abide any order which the court may make. I will go a step or two further with that case, to show how, notwithstanding the opinion that was delivered by the Chief Justice, the court came to a point in which they would not take another step.

When the subpoena was received by the President, Mr. Jefferson, he did not give to it any notice. He did not even make any return to the court, nor any excuse to the court. He simply wrote a letter to the district attorney, in which he stated, that he could not conceive how it was that, under such circumstances, the court should order him to go there by subpoena; that he would not go; that he did not propose to go; but he said to the district attorney that there was no difficulty in obtaining the paper in the proper way. But he would pay no respect to the subpoena. Thereupon Colonel Burr himself moved for compulsory process to compel the President to come. Of course that was legitimate. If the court, in saying that the President was amenable to subpoena, was right, the court was bound, at the instance of the defendant, to follow it up by process of attachment to compel obedience to its lawful order. At that point, however, the court hesitated, and not a step further was taken toward enforcing the doctrine laid down by the Chief Justice. It then became quite too apparent that a very great error had been committed. I say a very great error, with the greatest submission to the great Chief Justice, who, on circuit, at *nisi prius*,

suddenly, on a motion of this kind, had held that the President of the United States was liable to the subpoena of any court as President. . . .

It is with the approbation, advice, and instruction of the President that I appear here to make this objection. I should have felt bound to make it on my own motion, as the law officer of the government. But although counsel, in their bill, have said that the President has vetoed these Acts of Congress as unconstitutional, I must say, in defence of the President, this, that when the President did that, he did everything he intended to do in opposition to these laws. From the moment they were passed over his veto there was but one duty in his estimation resting upon him, and that was faithfully to carry out and execute these laws. He has instructed me to say that in making this objection, it is not for the purpose of escaping from any responsibility either to perform or to refuse to perform. . . .

THE CHIEF JUSTICE delivered the opinion of the court.

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out, certain Acts of Congress therein named.

The Acts referred to are those of March 2, and March 23, 1867, commonly known as the Reconstruction Acts.

The Attorney-General objected to the leave asked for, upon the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an Act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of *Marbury v. Madison*, *Secretary of State*, 1 Cranch, 137, furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by *mandamus* issuing from a court having jurisdiction.

So, in the case of *Kendall, Postmaster-General, v. Stockton & Stokes*, 12 Peters, 527, an Act of Congress had directed the Postmaster-General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced.

In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by *mandamus*.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the Acts named in the bill. By the first of these Acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary Act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as Commander-in-Chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional Act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting.

The constitutionality of the Act for the annexation of Texas was

vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the Act by the President.

And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress [the judges] can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the Acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an Act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an Act of Congress

by the incumbent of the Presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore,

*Denied.*<sup>1</sup>

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STATE OF GEORGIA v. STANTON.

SUPREME COURT OF THE UNITED STATES. 1867.

[6 Wall. 50.]

THIS was a bill filed April 15, 1867, in this court, invoking the exercise of its original jurisdiction, against Stanton, Secretary of War, Grant, General of the Army, and Pope, Major-General, assigned to the command of the Third Military District, consisting of the States of Georgia, Florida, and Alabama (a district organized under the Acts of Congress of the 2d March, 1867, entitled "An Act to provide for the more Efficient Government of the Rebel States," and an Act of the 23d of the same month supplementary thereto), for the purpose of restraining the defendants from carrying into execution the several provisions of these Acts; Acts known in common parlance as the "Reconstruction Acts." Both these Acts had been passed over the President's veto. . . .

The bill set forth the existence of the State of Georgia, the complainant, as one of the States of this Union under the Constitution; the Civil War of 1861-1865 in which she was involved; the surrender of the Confederate armies in the latter year, and submission to the Constitution and laws of the Union; the withdrawal of the military government from Georgia by the President, Commander-in-Chief of the army; and the revival and reorganization of the civil government of the State with his permission; and that the government thus reorganized was in the possession and enjoyment of all the rights and privileges in her several departments — executive, legislative, and judicial — belonging to a State in the Union under the Constitution, with the exception of a representation in the Senate and House of Representatives of the United States.

It set forth further that the intent and design of the Acts of Congress, as was apparent on their face and by their terms, was to overthrow and to annul this existing State government, and to erect

<sup>1</sup> As to the power of courts to control the action of other departments, see 1 Tucker's Bl. 358, note; 1 Burr's Trial (Phila. 1808), 114, 127, 131, 180, 249, 254; *Low v. Towns*, 8 Ga. 360, 372; *Appeal of Hartranft*, Governor, 85 Pa. St. 433; s. c. Thayer's Cas. Ev. 1153; *Martin v. Ingham*, 38 Kans. 641; *In re Gunn*, 50 Kans. 155 (1893). In the dissenting opinion of Allen, J., in the case last named, the authorities are very fully cited.

See also *United States v. Guthrie*, 17 How. 284, as to the limits of the power to control the action of a subordinate member of the executive department. — Ed.

another and different government in its place, unauthorized by the Constitution and in defiance of its guarantees; and that, in furtherance of this intent and design, the defendants (the Secretary of War, the General of the Army, and Major-General Pope), acting under orders of the President, were about setting in motion a portion of the army to take military possession of the State, and threatened to subvert her government, and to subject her people to military rule; that the State was wholly inadequate to resist the power and force of the Executive Department of the United States. She therefore insisted that such protection could, and ought to be afforded by a decree, or order, of this court in the premises. . . .

*Mr. Stanbery*, A. G., at the last term moved to dismiss the bill for want of jurisdiction.

*Messrs. Charles O'Connor, R. J. Walker* (with whom were *Messrs. Sharkey, Black, Brent, and E. Cowan*), *contra*.

The bill having been dismissed at the last term, MR. JUSTICE NELSON now delivered the opinion of the court.

A motion has been made by the counsel for the defendants to dismiss the bill for want of jurisdiction, for which a precedent is found in the case of *The State of Rhode Island v. The State of Massachusetts*, 12 Peters, 669. It is claimed that the court has no jurisdiction either over the subject-matter set forth in the bill or over the parties defendants. And, in support of the first ground, it is urged that the matters involved, and presented for adjudication, are political and not judicial, and, therefore, not the subject of judicial cognizance.

This distinction results from the organization of the government into the three great departments, executive, legislative, and judicial, and from the assignment and limitation of the powers of each by the Constitution.

The judicial power is vested in one supreme court, and in such inferior courts as Congress may ordain and establish: the political power of the government in the other two departments.

The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. *Nabob of Carnatic v. The East India Co.*, 1 Vesey, Jr., 375-393, S. C., 2 *Ib.* 56-60; *Penn v. Lord Baltimore*, 1 Vesey, 446-447; *New York v. Connecticut*, 4 Dallas, 4-6; *The Cherokee Nation v. Georgia*, 5 Peters, 1, 20, 29, 30, 51, 75; *The State of Rhode Island v. The State of Massachusetts*, 12 *Ib.* 657, 733, 734, 737, 738.

It has been supposed that the case of *The State of Rhode Island v. The State of Massachusetts*, 12 Peters, 657, is an exception, and affords an authority for hearing and adjudicating upon political questions in the usual course of judicial proceedings on a bill in equity. But it will be seen on a close examination of the case, that this is a mistake. It involved a question of boundary between the two States. Mr.



Justice Baldwin, who delivered the opinion of the court, states the objection, and proceeds to answer it. He observes (p. 736), "It is said that this is a political, not civil controversy, between the parties; and, so not within the Constitution, or thirteenth section of the Judiciary Act. As it is viewed by the court, on the bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles River, is the only question that can arise under the charter. Taking the case on the bill and plea, the question is, whether the stake set up on Wrentham Plain by Woodward and Saffrey, in 1842, is the true point from which to run an east and west line as the compact boundary between the States. In the first aspect of the case it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid; neither of which present a political controversy, but one of an ordinary judicial nature of frequent occurrence in suits between individuals." In another part of the opinion, speaking of the submission by sovereigns or States, of a controversy between them, he observes, "From the time of such submission the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power. It comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law, appropriate to its nature as a judicial question, depending on the exercise of judicial powers, as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires." And he might have added, what, indeed, is probably implied in the opinion, that the question thus submitted by the sovereign or State, to a judicial determination, must be one appropriate for the exercise of judicial power; such as a question of boundary, or as in the case of *Penn v. Lord Baltimore*, a contract between the parties in respect to their boundary. Lord Hardwicke places his right in that case to entertain jurisdiction upon this ground.

The objections to the jurisdiction of the court in the case of Rhode Island against Massachusetts were, that the subject-matter of the bill involved sovereignty and jurisdiction, which were not matters of property, but of political rights over the territory in question. They are forcibly stated by the Chief Justice, who dissented from the opinion. 12 Peters, 752, 754. The very elaborate examination of the case by Mr. Justice Baldwin, was devoted to an answer and refutation of these objections. He endeavored to show, and, we think, did show, that the question was one of boundary, which, of itself, was not a political question, but one of property, appropriate for judicial cognizance; and, that sovereignty and jurisdiction were but incidental, and dependent upon the main issue in the case. The right of property was undoubtedly involved; as in this country, where feudal tenures are abolished, in cases of escheat, the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.

In the case of *The State of Florida v. Georgia*, 17 Howard, 478,

the United States were allowed to intervene, being the proprietors of a large part of the land situated within the disputed boundary, ceded by Spain as a part of Florida. The State of Florida was also deeply interested as a proprietor.

The case, bearing most directly on the one before us, is *The Cherokee Nation v. The State of Georgia*, 5 Peters, 1. A bill was filed in that case and an injunction prayed for, to prevent the execution of certain Acts of the Legislature of Georgia within the territory of the Cherokee Nation of Indians, they claiming a right to file it in this court, in the exercise of its original jurisdiction, as a foreign nation. The Acts of the Legislature, if permitted to be carried into execution, would have subverted the tribal government of the Indians; and subjected them to the jurisdiction of the State. The injunction was denied, on the ground that the Cherokee Nation could not be regarded as a foreign nation within the Judiciary Act; and, that, therefore, they had no standing in court. But Chief Justice Marshall, who delivered the opinion of the majority, very strongly intimated, that the bill was untenable on another ground, namely, that it involved simply a political question. He observed, "That the part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possessions, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power, to be within the province of the judicial department." Several opinions were delivered in the case; a very elaborate one, by Mr. Justice Thompson, in which Judge Story concurred. They maintained that the Cherokee Nation was a foreign nation within the Judiciary Act, and competent to bring the suit; but agreed with the Chief Justice, that all the matters set up in the bill involved political questions, with the exception of the right and title of the Indians to the possession of the land which they occupied. Mr. Justice Thompson, referring to this branch of the case, observed: "For the purpose of guarding against any erroneous conclusions, it is proper I should state, that I do not claim for this court, the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief to the full extent prayed for by the bill may be beyond the reach of this court. Much of the matters therein contained by way of complaint, would seem to depend for relief upon the exercise of political power; and, as such, appropriately devolving upon the executive, and not the judicial department of the government. This court can grant relief so far, only, as the rights of persons or property are drawn in question, and have been infringed." And, in another part of the opinion, he returns, again, to this question, and is still more emphatic in disclaiming jurisdiction. He observes: "I certainly do

not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here." We have said Mr. Justice Story concurred in this opinion; and Mr. Justice Johnson, who also delivered one, recognized the same distinctions. 5 Peters, 29-30.

By the second section of the third article of the Constitution "the judicial power extends to all cases, in law and equity, arising under the Constitution, the laws of the United States," &c., and as applicable to the case in hand, "to controversies, between a State and citizens of another State," — which controversies, under the Judiciary Act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction, and we agree, that the bill filed, presents a case, which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.

The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain Acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained.

This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these Acts of Congress; which, it is charged, if carried into effect by the defendants, will work this destruction. But they are grievances, because they necessarily and inevitably tend to the

overthrow of the State as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them; and the resulting threatened mischief. So in respect to the prayers of the bill. The first is, that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the State, which is or may be directed, or required of them, by or under the two Acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

It is true, the bill, in setting forth the political rights of the State, and of its people to be protected, among other matters, avers, that Georgia owns certain real estate and buildings therein, State Capitol, and executive mansion, and other real and personal property; and that putting the Acts of Congress into execution, and destroying the State, would deprive it of the possession and enjoyment of its property. But, it is apparent, that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the State, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.

Having arrived at the conclusion that this court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants.

THE CHIEF JUSTICE: Without being able to yield my assent to the grounds stated in the opinion just read for the dismissal of the complainant's bill, I concur fully in the conclusion that the case made by the bill, is one of which this court has no jurisdiction.

*Bill dismissed for want of jurisdiction.*

## CHAPTER II.

## MAKING AND CHANGING WRITTEN CONSTITUTIONS.

## 1. CONSTITUTION OF THE UNITED STATES.

"In 1774, Massachusetts recommended the assembling of a Continental Congress to deliberate upon the state of public affairs; and according to her recommendation, delegates were appointed by the colonies for a congress to be held in Philadelphia in the autumn of the same year. In some of the legislatures of the colonies, which were then in session, delegates were appointed by the popular or representative branch; and in other cases they were appointed by conventions of the people in the colonies. The congress of delegates (calling themselves in their more formal acts 'the delegates appointed by the good people of these colonies') assembled on the 4th of September, 1774; and having chosen officers, they adopted certain fundamental rules for their proceedings.

"Thus was organized under the auspices and with the consent of the people, acting directly in their primary, sovereign capacity, and without the intervention of the functionaries, to whom the ordinary powers of government were delegated in the colonies, the first general or national government, which has been very aptly called 'the revolutionary government,' since in its origin and progress it was wholly conducted upon revolutionary principles. The congress thus assembled, exercised *de facto* and *de jure* a sovereign authority; not as the delegated agents of the governments *de facto* of the colonies, but in virtue of original powers derived from the people. The revolutionary government, thus formed, terminated only when it was regularly superseded by the confederated government under the articles finally ratified, as we shall hereafter see, in 1781. . . .

"In *Ware v. Hylton*, 3 Dall. 199, Mr. Justice Chase (himself also a Revolutionary statesman) said: 'It has been inquired, what powers Congress possessed from the first meeting in September, 1774, until the ratification of the confederation on the 1st of March, 1781. It appears to me that the powers of Congress during that whole period were derived from the *people* they represented, expressly given through the medium of their State conventions or State legislatures; or that after they were exercised, they were impliedly ratified by the acquiescence and obedience of the people, &c. The powers of Congress originated from necessity, and arose out of it, and were only limited by events; or, in other words, they were revolutionary in their nature. Their extent depended on the exigencies and necessities of public

affairs. I entertain this general idea, that the several States retained all internal sovereignty; and that Congress properly possessed the rights of external sovereignty. In deciding on the powers of Congress, and of the several States before the confederation, I see but one safe rule, namely, that all the powers actually exercised by Congress before that period were rightfully exercised on the presumption not to be controverted, that they were so authorized by the people they represented, by an express or implied grant; and that all the powers exercised by the State conventions or State legislatures were also rightfully exercised on the same presumption of authority from the people.' . . .

"On the 11th of June, 1776, the same day on which the committee for preparing the Declaration of Independence was appointed, Congress resolved that 'a committee be appointed to prepare and digest the form of a confederation to be entered into between these colonies;' and on the next day a committee was accordingly appointed, consisting of a member from each colony. Nearly a year before this period (*viz.*, on the 21st of July, 1775), Dr. Franklin had submitted to Congress a sketch of Articles of Confederation, which does not, however, appear to have been acted on. These articles contemplated a union until a reconciliation with Great Britain, and, on failure thereof, the confederation to be perpetual.

"On the 12th of July, 1776, the committee appointed to prepare Articles of Confederation presented a draft, which was in the handwriting of Mr. Dickenson, one of the committee, and a delegate from Pennsylvania. The draft, so reported, was debated from the 22d to the 31st of July, and on several days between the 5th and 20th of August, 1776. On this last day Congress, in committee of the whole, reported a new draft, which was ordered to be printed for the use of the members.

"The subject seems not again to have been touched until the 8th of April, 1777, and the articles were debated at several times between that time and the 15th of November of the same year. On this last day the articles were reported with sundry amendments, and finally adopted by Congress. A committee was then appointed to draft, and they accordingly drafted a circular letter, requesting the States respectively to authorize their delegates in Congress to subscribe the same in behalf of the State. . . .

"Many objections were stated, and many amendments were proposed. All of them, however, were rejected by Congress, not probably because they were all deemed inexpedient or improper in themselves, but from the danger of sending the instrument back again to all the States for reconsideration. Accordingly, on the 26th of June, 1778, a copy, engrossed for ratification, was prepared, and the ratification began on the 9th day of July following. It was ratified by all the States, except Delaware and Maryland, in 1778; by Delaware in 1779, and by Maryland on the 1st of March, 1781, from which last date its final ratification took effect, and was joyfully announced by Congress. . . .

"Such is the substance of this celebrated instrument, under which the

treaty of peace, acknowledging our independence, was negotiated, the War of the Revolution concluded, and the Union of the States maintained until the adoption of the present Constitution. . . .

“The leading defects of the confederation may be enumerated under the following heads:—

“In the first place, there was an utter want of all coercive authority to carry into effect its own constitutional measures. This, of itself, was sufficient to destroy its whole efficiency, as a superintending government, if that may be called a government which possessed no one solid attribute of power. It has been justly observed that, ‘a government authorized to declare war, but relying on independent States for the means of prosecuting it; capable of contracting debts, and of pledging the public faith for their payment, but depending on thirteen distinct sovereignties for the preservation of that faith, could only be rescued from ignominy and contempt by finding those sovereignties administered by men exempt from the passions incident to human nature.’ That is, by supposing a case in which all human governments would become unnecessary, and all differences of opinion would become impossible. In truth, Congress possessed only the power of recommendation. It depended altogether upon the good-will of the States, whether a measure should be carried into effect or not. And it can furnish no matter of surprise, under such circumstances, that great differences of opinion as to measures should have existed in the legislatures of the different States; and that a policy, strongly supported in some, should have been denounced as ruinous in others. Honest and enlightened men might well divide on such matters; and in this perpetual conflict of opinion the State might feel itself justified in a silent or open disregard of the Act of Congress. . . .

“In this state of things, commissioners were appointed by the Legislatures of Virginia and Maryland, early in 1785, to form a compact relative to the navigation of the rivers Potomac and Pocomoke, and the Chesapeake Bay. The commissioners having met at Alexandria in Virginia in March, in that year, felt the want of more enlarged powers, and particularly of powers to provide for a local naval force and a tariff of duties upon imports. Upon receiving their recommendation, the Legislature of Virginia passed a resolution for laying the subject of a tariff before all the States composing the Union. Soon afterwards, in January, 1786, the legislature adopted another resolution, appointing commissioners, ‘who were to meet such as might be appointed by the other States in the Union at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situation and trade of the States; to consider how far a uniform system in their commercial relations may be necessary to their common interest and their permanent harmony; and to report to the several States such an Act, relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress assembled to provide for the same.’

“These resolutions were communicated to the States, and a convention of commissioners from five States only, namely, New York, New Jersey, Pennsylvania, Delaware, and Virginia, met at Annapolis in September, 1786. After discussing the subject, they deemed more ample powers necessary, and as well from this consideration, as because a small number only of the States was represented, they agreed to come to no decision, but to frame a report to be laid before the several States, as well as before Congress. In this report they recommended the appointment of commissioners from all the States, ‘to meet at Philadelphia on the second Monday of May, then next, to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same.’

“On receiving this report, the Legislature of Virginia passed an Act for the appointment of delegates to meet such as might be appointed by other States, at Philadelphia. The report was also received in Congress. But no step was taken until the Legislature of New York instructed its delegation in Congress to move a resolution, recommending to the several States to appoint deputies to meet in convention for the purpose of revising and proposing amendments to the Federal Constitution. On the 21st of February, 1787, a resolution was accordingly moved and carried in Congress, recommending a convention to meet in Philadelphia, on the second Monday in May ensuing, ‘for the purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein, as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union.’ The alarming insurrection then existing in Massachusetts, without doubt, had no small share in producing this result. The report of Congress on that subject at once demonstrates their fears and their political weakness.

“At the time and place appointed, the representatives of twelve States assembled. Rhode Island alone declined to appoint any on this momentous occasion. After very protracted deliberations, the convention finally adopted the plan of the present Constitution on the 17th of September, 1787; and by a contemporaneous resolution, directed it to be ‘laid before the United States in Congress assembled,’ and declared their opinion, ‘that it should afterwards be submitted to a convention of delegates chosen in each State by the people thereof, under a recommendation of its legislature for their assent and ratification;’ and that each convention assenting to and ratifying the same should give notice thereof to Congress. The convention, by a further resolution, declared their opinion, that as soon as nine States had ratified the Constitution, Congress should fix a day on which electors should be appointed by the



States which should have ratified the same, and a day on which the electors should assemble and vote for the president, and time and place of commencing proceedings under the Constitution; and that after such publication the electors should be appointed and the senators and representatives elected. The same resolution contained further recommendations for the purpose of carrying the Constitution into effect. . . .

"Congress, having received the report of the convention on the 28th of September, 1787, unanimously resolved, 'that the said report, with the resolutions and letter accompanying the same, be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention, made and provided in that case.'

"Conventions in the various States which had been represented in the general convention were accordingly called by their respective legislatures; and the Constitution having been ratified by eleven out of the twelve States, Congress, on the 13th of September, 1788, passed a resolution appointing the first Wednesday in January following, for the choice of electors of president; the first Wednesday of February following, for the assembling of the electors to vote for a president; and the first Wednesday of March following, at the then seat of Congress [New York], the time and place for commencing proceedings under the Constitution. Electors were accordingly appointed in the several States, who met and gave their votes for a president; and the other elections for senators and representatives having been duly made, on Wednesday, the 4th of March, 1789, Congress assembled and commenced proceedings under the new Constitution. A quorum of both Houses, however, did not assemble until the 6th of April, when, the votes for President being counted, it was found that George Washington was unanimously elected President, and John Adams was elected Vice-President. On the 30th of April President Washington was sworn into office, and the government then went into full operation in all its departments.

"North Carolina had not, as yet, ratified the Constitution. The first convention called in that State, in August, 1788, refused to ratify it without some previous amendments and a declaration of rights. In a second convention, however, called in November, 1789, this State adopted the Constitution. The State of Rhode Island had declined to call a convention; but finally, by a convention held in May, 1790, its assent was obtained; and thus all the thirteen original States became parties to the new government." — 1 *Story's Commentaries on the Constitution of the United States* (5th ed.), §§ 200, 201, 216, 222-224, 225, 242, 248, 272-276, 277-280.<sup>1</sup>

<sup>1</sup> Reprinted by permission. — Ed.

## NOTE.

For the methods of changing the Constitution of the United States, see Article V. of that instrument. Can it legally be changed in any other way? See Jameson, *Const. Conv.* (4th ed.) s. 575.

It should, however, be carefully noted that the term "sovereignty," as long as it is accurately employed in the sense in which Austin sometimes (compare Austin, *Jurisprudence*, i. (4th ed.) p. 268) uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit. If the term "sovereignty" be thus used, the sovereign power under the English Constitution is clearly "Parliament." But the word "sovereignty" is sometimes employed in a political rather than in a strictly legal sense. That body is "politically" sovereign or supreme in a State the will of which is ultimately obeyed by the citizens of the State. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps in strict accuracy independently of the King and the Peers, the body in which sovereign power is vested. For, as things now stand, the will of the electorate and certainly of the electorate in combination with the Lords and the Crown is sure ultimately to prevail on all subjects to be determined by the British Government. The matter indeed may be carried a little further, and we may assert that the arrangements of the Constitution are now such as to insure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run always enforce their will. But the courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word "sovereignty" is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different, and in some parts of his work Austin has apparently confused the one sense with the other. — DICEY, *Law of the Constitution* (4th ed.), 69, 71.

In spite of the doctrine enunciated by some jurists that in every country there must be found some person or body legally capable of changing every institution thereof, it is hard to see why it should be held inconceivable<sup>1</sup> that the founders of a polity should have deliberately omitted to provide any means for lawfully changing its bases. Such an omission would not be unnatural on the part of the authors of a Federal union, since one main object of the States entering into the compact is to prevent further encroachments upon their several State rights; and in the fifth article of the United States Constitution may still be read the record of an attempt to give to some of its provisions temporary immutability. The question, however, whether a Federal Constitution necessarily involves the existence of some ultimate sovereign power authorized to amend or alter its terms is of merely speculative interest, for under existing Federal governments the Constitution will be found to provide the means for its own improvement. It is, at any rate, certain that whenever the found-

<sup>1</sup> Eminent American lawyers, whose opinion is entitled to the highest respect, maintain that under the Constitution there exists no person, or body of persons, possessed of legal sovereignty, in the sense given by Austin to that term, and it is difficult to see that this opinion involves any absurdity. Compare *Constitution of United States*, art. 5. It would appear further that certain rights reserved under the Constitution of the German Empire to particular States cannot under the Constitution be taken away from a State without its assent. (See *Reichsverfassung*, art. 78.) The truth is that a Federal Constitution partakes of the nature of a treaty, and it is quite conceivable that the authors of the Constitution may intend to provide no constitutional means of changing its terms, except the assent of all the parties to the treaty.

ders of a Federal government hold the maintenance of a Federal system to be of primary importance, supreme legislative power cannot in a confederacy be vested in any ordinary legislature acting under the Constitution.<sup>1</sup> For so to vest legislative sovereignty would be inconsistent with the aim of Federalism, namely, the permanent division between the spheres of the National Government and of the several States. If Congress could change the Constitution, New York and Massachusetts would have no legal guarantee for the amount of independence reserved to them under the Constitution, and would be as subject to the sovereign power of Congress as is Scotland to the sovereignty of Parliament; the Union would cease to be a Federal State, and would become a unitarian republic. If, on the other hand, the Legislature of South Carolina could of its own will amend the Constitution, the authority of the central government would (from a legal point of view) be illusory; the United States would sink from a nation into a collection of independent countries united by the bond of a more or less permanent alliance. Hence the power of amending the Constitution has been placed, so to speak, outside the Constitution, and one may say, with sufficient accuracy for our present purpose, that the legal sovereignty of the United States resides in the majority of a body constituted by the joint action of three fourths of the several States at any time belonging to the Union. See Constitution of U. S., art. 5. Now from the necessity for placing ultimate legislative authority in some body outside the Constitution a remarkable consequence ensues. Under a federal as under a unitarian system there exists a sovereign power, but the sovereign is in a Federal State a despot hard to rouse. He is not, like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The sovereign of the United States has been roused to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A Federal Constitution is capable of change, but for all that, a Federal Constitution is apt to be unchangeable. *Ib.* 137-140. — *Ed.*

## 2. STATE CONSTITUTIONS.

"WHEN the colonies entered upon that course of opposition to the Crown which ripened into the Revolution, it was neither their intention nor their desire to effect a separation from Great Britain. . . . The organizations provided were of the simplest character, consisting of Provincial Conventions or Congresses, modelled on the same plan as the General Congress at Philadelphia, comprising a single chamber, in which was vested all the powers of government. These bodies, found in all the colonies, save Connecticut and Rhode Island, whose Assemblies, fairly chosen by the people, it was not found necessary to supersede, were made up of deputies elected by the constituencies established under the Crown, or appointed by meetings of the principal citizens or by the municipal authorities of the chief towns and cities. All legislative authority was exercised by those bodies directly. Their executive functions were intrusted to Committees of Correspondence, of Public Safety, and the like, appointed by themselves, and during the sittings of the Conventions or Congresses, were discharged under their own supervision. In the *interims* between their sessions, however, the powers of those committees were substantially absolute.

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<sup>1</sup> Under the Constitution of the German Empire the Imperial legislative body can amend the Constitution. But the character of the Federal Council (*Bundesrath*) gives ample security for the protection of State rights. No change in the Constitution can be effected which is opposed by fourteen votes in the Federal Council. This gives a veto on change to any one of three States and to combinations of minor States. The extent to which national sentiment and State patriotism respectively predominate under a Federal system may be conjectured from the nature of the authority which has the right to modify the Constitution. . . .

"Under organizations thus loose and unrestricted, government was carried on in the colonies for many months, and that without protest or discontent, so long as the general expectation of a return to allegiance, following upon a redress of grievances, continued to exist. As time advanced, however, and it became evident, on the one hand, that the mother country would not purchase the submission of her revolted subjects by compromise or even by conciliation, and, on the other, that the work of subduing them, if possible at all, could be accomplished only by a long and bloody contest, there arose a general desire for the establishment of more regular governments than those by Congresses and committees. Thus, in May, 1775, the Provincial Convention of Massachusetts, charged with the government of the colony, applied to the Congress at Philadelphia for explicit advice respecting the proper exercise of the powers of government. In reply, after declaring that no obedience was due to the Act of Parliament lately passed for altering her charter, that body recommended that the convention should write letters to the several towns entitled to representation in the Assembly, requesting them to choose representatives to form an Assembly, and to instruct the latter, when convened, to elect counsellors; adding their wish, that the bodies thus formed should exercise the powers of government until a governor of the king's appointment would consent to govern the colony according to its charter. This answer was made in June, 1775, and the advice given was followed, and the government thus constituted was the only one Massachusetts had until the establishment of her first Constitution in 1780. In October, 1775, the delegates to the Continental Congress from New Hampshire laid before that body instructions, received by them from the New Hampshire Convention, to obtain the advice and direction of Congress in relation to the establishment of civil government in that colony. Similar requests were, about the same time, sent up from the Provincial Conventions of Virginia and South Carolina. At length, on the 3d and 4th of November, 1775, Congress agreed upon a reply to these applications, in which those bodies were advised 'to call a full and free representation of the people, in order to form such a form of government as, in their judgment, would best promote the happiness of the people, and most effectually secure peace and good order in their provinces during the continuance of the dispute with Great Britain.' . . .

"The first colony to act upon the recommendations of Congress was New Hampshire. In less than a fortnight after the passage by Congress of the resolutions of November 3d, 1775, the Provincial Convention of that Colony took into consideration the mode in which 'a full and free representation' for the purpose indicated by Congress should be constituted. It was finally determined that it should take the form of a new convention, to be summoned by the Provincial Convention, and that for the purpose of apportioning fairly the delegates to be chosen to it, a census of the inhabitants should be taken. It was moreover recommended, that the representatives chosen 'should be empowered by their constituents to assume government, as recommended by the General Congress, and to continue for one whole year from the time of such assumption.' Having recommended this plan, and 'sent copies of it to the several towns, the convention dissolved.' In pursuance of the recommendations accompanying the plan, a new convention was chosen, and assembled on the 21st of December following, by which the first Constitution of New Hampshire was framed, and her first formal government, independent of the Crown, established. According to Dr. Belknap, the historian of the State, 'as soon as the new convention came together, they drew up a temporary form of government; and, agreeably to the trust reposed in them by their constituents, having assumed the name and authority of a House of Representatives, they proceeded to choose twelve persons, to be a distinct branch of the legislature, by the name of a council.' This form of government was practically limited to a single year by an ordinance providing 'that the present Assembly should subsist one year, and if the dispute with Great Britain should continue longer, and the General Congress should give no directions to the contrary, that precepts should be issued annually' for the return of 'new Counsellors and Representatives.' By the convention thus called and organized were assumed all the powers of government. In a word, it was a revolutionary convention. As distinguished from the body itself, there was no judiciary, and no executive. The only feature in which it resembled a regularly

constituted government, was in its division into two chambers. But even this resemblance vanishes, when it is considered that it was a voluntary division, the council being its own creation, and, of course, as little independent of the main body as any one of its committees. All the powers of the State were concentrated in that single body, which was revolutionary not only in its proceedings, but in its origin, as called by one revolutionary convention at the instance of another, and as exercising, when assembled, the functions of a government, provisionally, in place of that by which it was convened.

"The people of New Hampshire, however, becoming dissatisfied with the temporary Constitution of 1776, an attempt was made three years later to frame a new one. A convention of delegates, chosen for that purpose, under the direction of the existing government, drew up and presented to the people a form of a constitution, but so deficient in its principles and so inadequate in its provisions, that, being proposed to the people in their town-meetings, it was rejected. On the failure to adopt this, a new convention was elected for the same purpose, and commenced its sessions in 1781. The year before, Massachusetts had adopted a constitution, in the main from a draft prepared by John Adams, which was supposed to be an improvement on all that had been framed in America. Having the advantage of this, the New Hampshire Convention digested a plan and submitted it to the people in their town-meetings, with a request that they should state their objections distinctly to any particular part, and return them to the convention at a fixed time. The objections were so many and various, that it became necessary to alter the form and send it out a second time. The second plan was generally approved by the people, and thus, finally, after nine sessions of the convention, running through more than two years, a constitution was adopted and put in operation, — the instrument being completed October 31, 1783, and established with religious solemnities June 2, 1784.

"Of these two last conventions, it is to be noted, that, unlike the first, they were, in the strict sense of the term, constitutional conventions. They were initiated by the existing government of the State, which, whatever may be thought of its legitimacy or regularity, was a *de facto* government, by revolution placed in power, and made the basis on which the political structure of the State has ever since rested; the people were fairly represented in them; they confined themselves strictly to their constitutional duty, that of proposing a code of organic laws, abstaining from all usurpation of governmental powers; and, finally, they severally submitted their projected constitutions to a vote of the electors of the State, in their town-meetings — an act which, as we shall see, constitutes the best guarantee of the sovereign right of the people over the form of their government that has ever been devised." — JAMESON, *Const. Conv.* (4th ed.) ss. 126, 127, 131, 132.<sup>1</sup>

"At a quite early date, June 6, 1776, a proposition was made in the General Court<sup>2</sup> that a committee should be appointed to prepare a form of government, and such committee was appointed; but the business was not proceeded in, as the opinion was generally expressed that the subject should originate with the people, who were the proper source of the organic law. The House therefore contented themselves with recommending to their constituents to choose their deputies to the next General Court with power to adopt a form of government for the State; and, to give greater effect to this recommendation, it was renewed more formally in the following spring. In this interval, a con-

<sup>1</sup> Reprinted by permission of the publishers, Messrs. Callaghan & Co. of Chicago, and of the owners of the copyright. — Ed.

<sup>2</sup> Of Massachusetts. The facts relating to the formation of this particular constitution are here given because it is the oldest of those now existing, and for other reasons, indicated at pp. 54–55, *ante*. — Ed.

vention was held in the county of Worcester of the Committees of Safety from a majority of the towns, who voted that it would be improper for the existing General Court to form a constitution, but that a convention of delegates from all the towns in the State should be called for that purpose.

"How far the decision of this convention influenced the action of the people does not appear; but a majority of the towns in the State, it would seem, chose their representatives for the next annual session of the General Court with a special view, or, at least, with an implied consent, to the formation of a constitution by that body. The citizens of Boston, and of a number of other towns, as well as the Committees of Safety in the county of Worcester, were opposed to this proceeding, and favored the calling of a convention of delegates. . . .

"At the usual time the General Court was convened; and, a few weeks after the opening of its sessions, a committee was appointed, consisting of four members of the Council and eight members of the House, for the purpose of preparing a constitution. Of the proceedings of this committee but little is known, as their records have not been published; but the result of their deliberations was a draft of a constitution, which was debated at length, approved by the convention, February 28, 1778, presented to the legislature, and submitted to the people, by whom it was rejected. . . .

"The opinion was still current that a convention was the proper body to decide upon a Constitution for the State, and that no other body could successfully discharge that duty. A majority of the people, therefore, favored the calling of such a convention; and, at the annual election in the following year, by the advice of the General Court previously given, the returns from the towns were so conclusive that precepts were issued for the choice of delegates, to meet at Cambridge in the ensuing September." — *3 Barry's Hist. Mass.* 173-176.

IN THE HOUSE OF REPRESENTATIVES, Feb. 19, 1779.

*Whereas*, the Constitution or Form of Civil Government, which was proposed by the late convention of this State to the people thereof, hath been disapproved by a majority of the inhabitants of said State, —

*And whereas*, It is doubtful from the representations made to this court, what are the sentiments of the major part of the good people of this State, as to the expediency of now proceeding to form a new constitution of government, —

*Therefore resolved*, That the selectmen of the several towns within this State cause the freeholders and other inhabitants in their respective towns, duly qualified to vote for representatives,<sup>1</sup> to be lawfully warned to meet together in some convenient place therein, on or before the last Wednesday of May next, to consider of, and determine upon, the following questions :

<sup>1</sup> For the property qualifications of such electors see the Province Charter. 1 Acts and Resolves of the Province, 11-12; 1 Poore's Charters, 949. — Ed.

*First.* — Whether they choose, at this time, to have a new constitution or form of government made.

*Secondly.* — Whether they will empower their representatives for the next year to vote for the calling a State convention, for the sole purpose of forming a new constitution; provided it shall appear to them, on examination, that a major part of the people present and voting at the meetings, called in the manner and for the purpose aforesaid, shall have answered the first question in the affirmative?

And in order that the sense of the people may be known thereon, —

*Be it further resolved,* That the selectmen of each town be and hereby are directed to return into the secretary's office, on or before the first Wednesday in June next, the doings of their respective towns, on the first question above mentioned, certifying the numbers voting in the affirmative, and the numbers voting in the negative, on said question.

Sent up for concurrence.

JOHN PICKERING, *Speaker.*

IN COUNCIL, February 20, 1779. Read and concurred.

JOHN AVERY, *D. Secretary.*

*Journal of Mass. Convention, 1779–80, pp. 189, 190.*

IN THE HOUSE OF REPRESENTATIVES, June 15, 1779.

*Whereas,* By the returns made into the secretary's office, from more than two thirds of the towns belonging to this State, agreeably to a Resolve of the General Court, of the 20th of February last, it appears, that a large majority of the inhabitants of such towns, as have made return as aforesaid, think it proper to have a new constitution or form of government, and are of opinion, that the same ought to be formed by a convention of delegates, who should be specially authorized to meet for this purpose,

*Therefore resolved,* That it be, and it hereby is recommended to the several inhabitants of the several towns in this State to form a convention, for the sole purpose of framing a new constitution, consisting of such number of delegates, from each town throughout this State, as every different town is entitled to send representatives to the General Court, to meet at Cambridge, in the county of Middlesex, on the first day of September next. And the selectmen of the several towns and places within this State, empowered by the laws thereof to send members to the General Assembly, are hereby authorized and directed to call a meeting of their respective towns, at least fourteen days before the meeting of said convention, to elect one or more delegates, to represent them in said convention, at which meeting, for the election of such delegate or delegates, every freeman, inhabitant of such town, who is twenty-one years of age, shall have a right to vote.

*Be it also resolved,* That it be, and it hereby is recommended, to the inhabitants of the several towns in this State, to instruct their respective delegates, to cause a printed copy of the form of a constitution

they may agree upon in convention, to be transmitted to the selectmen of each town, and the committee of each plantation; and the said selectmen and committees are hereby empowered and directed to lay the same before their respective towns and plantations, at a regular meeting of the male inhabitants thereof, being free and twenty-one years of age, to be called for that purpose, in order to its being duly considered and approved or disapproved by said towns and plantations. And it is also recommended to the several towns within this State, to instruct their respective representatives to establish the said form of a Constitution, as the Constitution and form of government of the State of Massachusetts Bay, if, upon a fair examination, it shall appear, that it is approved of by at least two thirds of those, who are free and twenty-one years of age, belonging to this State, and present in the several meetings.

Sent up for concurrence.

JOHN HANCOCK, *Speaker*.

IN COUNCIL, June 17, 1779. Read and concurred.

JOHN AVERY, *Deputy Secretary*.

Consented to by a major part of the Council. A true copy.

Attest,

JOHN AVERY, *Deputy Secretary*.

*Ib.* 5, 6.

The Convention met at Cambridge, September 1, 1779.

IN CONVENTION, March 2, 1780.

*Resolved*, That this convention be adjourned to the first Wednesday in June next, to meet at Boston; and that eighteen hundred copies of the form of government, which shall be agreed upon, be printed; and including such as shall be ordered to each member of the convention, be sent to the selectmen of each town, and the committees of each plantation, under the direction of a committee to be appointed for the purpose: and that they be requested, as soon as may be, to lay them before the inhabitants of their respective towns and plantations. And if the major part of the inhabitants of the said towns and plantations disapprove of any particular part of the same, that they be desired to state their objections distinctly, and the reasons therefor: and the selectmen and committees aforesaid are desired to transmit the same to the secretary of the convention, on the first Wednesday in June, or if may be, on the last Wednesday in May, in order to his laying the same before a committee, to be appointed for the purpose of examining and arranging them for the revision and consideration of the convention at the adjournment; with the number of voters in the said town and plantation meetings, on each side of every question; in order that the said convention, at the adjournment, may collect the general sense of their constituents on the several parts of the proposed Constitution: And if there doth not appear to be two thirds of their constituents in favor thereof, that the convention may alter it in such a manner as that it



may be agreeable to the sentiments of two thirds of the voters throughout the State.

*Resolved*, That it be recommended to the inhabitants of the several towns and plantations in this State, to empower their delegates, at the next session of this convention, to agree upon a time when this form of government shall take place, without returning the same again to the people: *Provided*, That two thirds of the male inhabitants of the age of twenty-one years and upwards, voting in the several town and plantation meetings, shall agree to the same, or the Convention shall conform it to the sentiments of two thirds of the people as aforesaid.

*Resolved*, That the towns and plantations through this State have a right to choose other delegates, instead of the present members, to meet in convention on the first Wednesday in June next, if they see fit.

A true copy.

Attest, SAMUEL BARRETT, *Secretary*.

*Ib.* 168, 169.

IN CONVENTION, June 16, 1780.

*Whereas*, Upon due examination of the returns made by the several towns and plantations, within this State, it appears that more than two thirds of the inhabitants thereof, who have voted on the same, have expressed their approbation of the form of government agreed upon by this convention, and laid before them for their consideration, in conformity to a Resolve of the said convention, of the second day of March last. This convention do, hereupon, declare the said form to be the constitution of government established by and for the inhabitants of the State of Massachusetts Bay.

And as the said inhabitants have authorized and empowered this convention to agree upon a time when the same shall take place, in order that the good people of this State may have the benefit thereof, as soon as conveniently may be.

*It is resolved*, That the said Constitution or frame of government shall take place on the last Wednesday in October next; and not before, for any purpose, save only for that of making elections agreeable to this resolution.

And the first General Court under the same shall be holden on the said last Wednesday in October, at the State-House in Boston, at ten o'clock in the forenoon. And in order thereto, there shall be a meeting of the inhabitants of each town and plantation in the several counties within this State, legally warned and held, on the first Monday in September next, for the purpose of electing a governor, lieutenant-governor, and persons for councillors and senators. And there shall also be a meeting of the inhabitants of the several towns within this State, duly warned and held, some time in October next, and ten days at the least before the last Wednesday in the same month, for the purpose of choosing representatives to serve in the said General Court. And the selectmen are hereby enjoined to call such meetings and to

preside at the same. And in all elections, and in making, receiving, and examining returns, and in conducting the whole business of organizing and establishing the said General Court, the same rules are to be observed, that are prescribed in the form of government for making such elections, and for the constituting the first General Court; saving only the difference of time.<sup>1</sup>

*And be it further resolved*, That Samuel Barrett, Esq. (secretary to this convention), do, on or before the fifteenth day of July next, cause printed copies of this resolution to be sent to the selectmen of the several towns, and the assessors of the several plantations aforesaid, who are respectively to perform the duties required by this resolution, and to make seasonable and regular returns of the persons elected to the several offices herein mentioned, into the secretary's office of this State, agreeably to the rules contained in the form of government above referred to.

In the name, and pursuant to a resolution of the convention.

JAMES BOWDOIN, *President*.

Attest, SAMUEL BARRETT, *Secretary*.

*Ib.* 186, 187.

#### NOTE.

No steps were taken in 1795 towards revising the Constitution of Massachusetts under Part II. c. 6, art. 10, — the only provision made for that purpose in the instrument. Nevertheless, in 1820, the legislature passed an Act submitting to the electors the question whether it was expedient to hold a convention for "revising or altering" the Constitution, and providing, in case of an affirmative vote, for the subsequent election of delegates and the holding of the convention. In accordance with this law, a convention met in 1820, and fourteen amendments were submitted to the people (*i. e.*, electors), of which nine were adopted. The last of these, Art. IX., will be found below, in the Appendix to Part I. p. 000.

In 1853, another convention was called for the same purpose and in the same manner as that of 1820. It submitted to the people a new draft of the Constitution; this was rejected.

As regards the now prevalent mode of amending, by means of a legislative proposal submitted to the people, — adopted in the ninth Massachusetts Amendment, — the origin of it is traced to the Articles of Confederation, Art. XIII., requiring that any alteration should be "agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State." And so the Constitution of the United States, Art. V., provided for amendments through a legislative proposal ratified by the States. As among State constitutions, Connecticut seems to have been the first to introduce it. An intelligent and accurate French writer has said: "La procédure inaugurée au Massachusetts [II. c. 6, 10] était bonne pour une révision totale, mais cette occurrence était rare et, dans les cas de plus en plus fréquents où l'on désirait une révision partielle, ne comportant parfois qu'un seul amendement, l'élection d'une convention, après consultation préalable du peuple, était un moyen coûteux, encombrant, et susceptible de provoquer une agitation inutile. Il appartenait à un autre État de la Nouvelle-Angleterre de donner sa formule à la méthode qui devait répondre à cette nécessité nouvelle et prévaloir également peu à peu dans l'Union.

"En 1818, lorsque l'antique charte du Connecticut, dépassée par le progrès de cette démocratie dont elle avait elle-même frayé le chemin, fut remplacée par la Constitution

<sup>1</sup> For the property qualifications of the electors under the new Constitution, see Const. Mass. Part II. c. 1, § 2, art. 2, and § 3, art. 4; and c. 2, § 1, art. 3. — *Ed.*

actuelle, la convention d'Hartford, avant de soumettre son œuvre au peuple, y inséra l'article suivant : —

" Art. II. — Lorsque la chambre des représentants jugera nécessaire d'apporter des amendements ou des modifications à cette Constitution, la majorité pourra en faire la proposition. Les amendements projetés seront renvoyés à la prochaine assemblée générale et publiés avec les lois qui pourront avoir été faites pendant la session. Si, par un vote de division provoqué au cours de la session suivante, les deux tiers des membres de chaque chambre approuvant les dits amendements, ils seront transmis par le chancelier aux secrétaires municipaux (*town clerks*) de chacune des communes de l'État.

" Ces derniers auront à les soumettre aux habitants, pour être examinés, dans un *town meeting* légalement convoqué et tenu à cet effet. S'il résulte de cette consultation, dont la loi déterminera les formes, que ces amendements ont été sanctionnés par la majorité des électeurs présents, ils deviendront exécutoires comme partie intégrante de cette Constitution."

" Cet article était le résultat d'une transaction heureuse entre le système du Massachusetts et un autre, celui qu'avait consacré, en 1776, la Constitution du Maryland et qu'avait adopté la Caroline méridionale, en 1790, et la Géorgie en 1798. Dans ces États, un vote des deux chambres, répété après une élection générale, était la condition requise pour l'adoption d'un ou de plusieurs amendements constitutionnels. Cette procédure facilitait, dans une certaine mesure, la révision partielle. La convention d'Hartford en fit son profit, mais sans abandonner le principe que le peuple doit avoir le dernier mot. Dans la disposition qu'elle rédigea, les députés à la législature reçurent le droit d'initiative, exercé à la majorité des deux tiers, ce qui était la clause insérée en 1787 dans la Constitution Fédérale, et les *town meetings* conservèrent la décision, conformément aux traditions de la Nouvelle-Angleterre.

" L'article passa presque aussitôt dans la Constitution du Maine, vaste district du Massachusetts, dont on faisait un nouvel État. La Convention de Portland, qui élabore cette Constitution, en 1819, était animée d'un esprit très démocratique. En s'assimilant l'article créé par la Convention d'Hartford, elle y apporta, d'emblée, une modification qui ne devait être imitée que beaucoup plus tard dans les autres États. Elle y supprima la condition de la double épreuve pour l'exercice du droit d'initiative. L'adoption par une seule législature, à la majorité des deux tiers des membres dans les deux chambres, lui paraissait suffisante pour qu'un amendement pût être soumis au peuple."

Annales de l'École Libre des Sciences Politiques (1893) ; *L'Établissement et la Révision des Constitutions aux États-Unis d'Amérique*, by Charles Borgeaud.

Jameson's note on this subject (*Const. Conv.* (4th ed.) § 574 d, note) is not entirely accurate. — Ed.

## OPINION OF THE JUSTICES.

THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1833.

[6 *Cush.* 573.]

The justices of the Supreme Judicial Court have taken into consideration the two questions submitted to them [by the House of Representatives], and upon which the honorable House has requested their opinion, of the following tenor, namely : —

First. Whether, if the legislature should submit to the people to vote upon the expediency of having a convention of delegates of the people,

for the purpose of revising or altering the Constitution of the Commonwealth in any specified parts of the same; and a majority of the people voting thereon should decide in favor thereof, could such convention holden in pursuance thereof act upon, and propose to the people, amendments in other parts of the Constitution not so specified?

Second. Can any specific and particular amendment or amendments to the Constitution be made in any other manner than that prescribed in the ninth article of the amendments adopted in 1820?

And thereupon have the honor to submit the following opinion:—

The court do not understand that it was the intention of the House of Representatives to request their opinion upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing Constitution to accomplish the objects for which it was designed, to provide for the amendment or alteration of their fundamental laws; nor what would be the effect of any change and alteration of their Constitution, made under such circumstances and sanctioned by the assent of the people. Such a view of the subject would involve the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded, rather than any question upon the nature, construction, or operation of the existing Constitution of the Commonwealth, and the laws made under it. We presume, therefore, that the opinion requested applies to the existing Constitution and laws of the Commonwealth, and the rights and powers derived from and under them. Considering the questions in this light, we are of opinion, taking the second question first, that, under and pursuant to the existing Constitution, there is no authority given by any reasonable construction or necessary implication, by which any specific and particular amendment or amendments of the Constitution can be made, in any other manner than that prescribed in the ninth article of the amendments adopted in 1820. Considering that previous to 1820 no mode was provided by the Constitution for its own amendment, that no other power for that purpose, than in the mode alluded to, is anywhere given in the Constitution, by implication or otherwise, and that the mode thereby provided appears manifestly to have been carefully considered, and the power of altering the Constitution thereby conferred to have been cautiously restrained and guarded, we think a strong implication arises against the existence of any other power, under the Constitution, for the same purposes.

Upon the first question, considering that the Constitution has vested no authority in the legislature, in its ordinary action, to provide by law for submitting to the people the expediency of calling a convention of delegates, for the purpose of revising or altering the Constitution of the Commonwealth, it is difficult to give an opinion upon the question, what would be the power of such a convention, if called. If, however, the people should, by the terms of their vote, decide to call a convention of delegates to consider the expediency of altering the Constitution in some particular part thereof, we are of opinion that such delegates would

derive their whole authority and commission from such vote ; and, upon the general principles governing the delegation of power and authority, they would have no right, under such vote, to act upon and propose amendments in other parts of the Constitution not so specified.

LEMUEL SHAW,  
SAMUEL PUTNAM,  
S. S. WILDE,  
MARCUS MORTON.

January 24, 1833.

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IN RE THE CONSTITUTIONAL CONVENTION.

THE JUSTICES OF THE SUPREME COURT OF RHODE ISLAND. 1883.

[14 R. I. 649.]

ARTICLE 13 of the Constitution of the State of Rhode Island is as follows :

“The General Assembly may propose amendments to this Constitution by the votes of a majority of all the members elected to each House. Such propositions for amendment shall be published in the newspapers, and printed copies of them shall be sent by the Secretary of State, with the names of all the members who shall have voted thereon, with the yeas and nays, to all the town and city clerks in the State. The said propositions shall be, by said clerks, inserted in the warrants or notices by them issued for warning the next annual town and ward meetings in April ; and the clerks shall read said propositions to the electors when thus assembled, with the names of all the representatives and senators who shall have voted thereon, with the yeas and nays, before the election of senators and representatives shall be had. If a majority of all the members elected to each House, at said annual meeting, shall approve any proposition thus made, the same shall be published and submitted to the electors in the mode provided in the Act of approval ; and if then approved by three fifths of the electors of the State present and voting thereon in town and ward meetings, it shall become a part of the Constitution of the State.”

Article 10, section 3, provides, that “the judges of the Supreme Court shall . . . give their written opinion upon any question of law whenever requested . . . by either House of the General Assembly.”

March 20, 1883, the Senate of the State adopted the following resolution :

“Whereas, a difference of opinion has arisen among members of the General Assembly,

“I. As to the legal competency thereof under the Constitution of the State to call upon the electors to elect members to constitute a convention to frame a new Constitution of the State, and to provide that the new Constitution should be submitted for adoption, either to the qualified electors of the State, or to the persons who would be entitled

to vote under said new Constitution, for adoption, and if a majority of such electors or persons voting should vote in favor thereof, whether the new Constitution would then become the legally adopted Constitution of the State and be binding as such upon all of the people thereof.

"II. As to whether it is legally competent for the General Assembly to submit to the qualified electors the question whether said electors will call a convention to frame a new Constitution, and to provide by law if a majority of the electors voting upon said question shall vote in favor of calling such convention, that the same be held, and the new Constitution framed by said convention be submitted to the electors for their adoption, either to the electors qualified by law, or to the persons who may be qualified to vote under such new Constitution, and whether if a majority of the electors, or persons voting thereon, vote for the adoption of such Constitution, whether the Constitution so to be framed and adopted would be the legal Constitution of the State, and as such be binding upon all the people thereof.

"And whereas, the existing Constitution provides that either House of the General Assembly may require the opinion of the judges of the Supreme Court upon any question of law, it is therefore hereby

"Resolved, that the said judges of the said Supreme Court be, and they hereby are requested without unnecessary delay to give their opinion to the Senate upon the two questions stated in the preamble hereto, upon which differences of opinion have arisen between the members of this General Assembly.

"Resolved, that his Excellency the Governor be, and he hereby is, requested to forward copies of the preceding preamble and resolution to each of the judges of the said Supreme Court."

#### OPINION OF THE COURT.<sup>1</sup>

March 30, 1883.

*To the Honorable the Senate of the State of Rhode Island and Providence Plantations:*

We received from your Honors on the 24th inst. a resolution requesting our opinion in regard to the legal competency of the General Assembly to call a convention for the revision of the Constitution. In reply we have to say that we are of opinion that the mode provided in the Constitution for the amendment thereof is the only mode in which it can be constitutionally amended. The ordinary rule is that where power is given to do a thing in a particular way, there the affirmative words, marking out the particular way, prohibit all other ways by implication, so that the particular way is the only way in which the power can be legally executed. The rule was recently recognized by the Supreme Court of the United States in *Smith v. Stevens*, 10 Wall. 321. There by Act of Congress, lands were ceded to Indians with power

<sup>1</sup> See *Taylor v. Place*, ante, 180 n. — Ed.

to sell them, or parts of them, in a particular manner, and the court held that a sale in any other manner was void. The rule was likewise recently recognized by the English Court of Exchequer in a case in which it was thus expressed: "If authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the Act authorized under other circumstances than those so defined: '*Expressio unius est exclusio alterius.*'" *North Stafford Steel, &c. Co. v. Ward*, L. R. 3 Exch. 172, 177. Cases to the same point might be indefinitely multiplied. 1 Kent Comment. \*467, note *d*; 1 Sugden on Powers, 258 *et seq.*; *City of New Haven v. Whitney*, 36 Conn. 373; *District Township of the City of Dubuque v. The City of Dubuque*, 7 Iowa, 262. It has been claimed, indeed, that the rule, though applicable in the interpretation of statutes, deeds, wills, and other ordinary instruments, is inapplicable in the interpretation of a State constitution. Those who assert this difference, however, do not appear to have any reason to give for it but this, namely: that under stress of strong political excitement, the rule, if it exists, is pretty sure to be disregarded, as past experience proves, and therefore it is better to conclude that it does not exist. We do not consider the reason satisfactory. The rule is simply a guide to the meaning of language when used in a particular way, and we do not see why it is not as trustworthy a guide to the meaning when the language so used occurs in a State Constitution, as when it occurs in a statute or a will. Men do not put away their spontaneous and habitual modes of expressing themselves merely because they are engaged in the unaccustomed work of framing or adopting a constitution. In this view we are not without precedent. One of the greatest of modern jurists, Chief Justice Shaw, was of the same way of thinking, and conjointly with his associates, declared it to be his opinion that the Constitution of Massachusetts is constitutionally amendable only as therein provided. Opinion of the Justices, 6 Cush. 573. The provision for amendment in our Constitution is singularly explicit. The proposed amendment is first to pass the two Houses of the General Assembly by a majority of the members elected; it is then to be published, with the vote thereon, in the newspapers, and otherwise brought to the attention of the people; it is then to pass the Assembly elected after such publication by a majority of both Houses; and finally it is to be submitted to the approval of the electors, and if it be approved by three fifths of the electors voting, and not otherwise, it is to become incorporated in the Constitution. Evidently the purpose was to insure the calm and considerate action of both the Assembly and the people. It was to pass two Assemblies, so that the members of the second, elected after publication, might, if the electors thought proper, be elected specially to consider it. The popular mind was not to be taken by surprise or to be carried away by any sudden sentiment, but it was to act deliberately after reflection. To this end a three fifths vote was required for approval. The object was not to hamper or baffle the

popular will, but to insure its full expression. Our ancestors knew, what we all know, that in spite of all precautions a majority may be worked up for an occasion, which is not the true and permanent majority. They also knew, what we all know, that many electors, perfectly satisfied with the existing state of things, stay away from the polls on election day from mere inertness of temperament. It is inconceivable to us, that they would have elaborated so guarded a mode of amendment, unless they had intended to have it exclusive and controlling. They doubtless did so intend, and if they did, we cannot say they did not, simply because since then the constitutions of other States, having similar provisions, have been amended through the medium of conventions. The framers of our Constitution could not foreknow this action in other States, and therefore cannot have been influenced by it. If our Constitution had no provision for amendment, then, indeed, a power in the Assembly to call a convention or to initiate amendments in some other manner might be implied *ex necessitate*. The Assembly, under the charter, exercised such a power because the charter had no such provision; though it is proper to remark that under the charter the legislative power of the Assembly was practically unlimited. Again, if the provision for amendment was impracticable, there might be, if no legal reason, yet some excuse for disregarding it. But it is practicable, as a successful resort to it in several instances has demonstrated. The only things which can be said against it are that it is dilatory, and that it requires the assent of more than a bare majority. But these are the very things which recommended it to its authors, and therefore they cannot be alleged as reasons for believing that they did not mean it to be exclusive and controlling.

Our Constitution is, by its own express declaration, the supreme law of the State; any law inconsistent with it is void, and, therefore, if the provision which it contains for its own amendment is exclusive, implying a prohibition of amendments in any other manner, then, of course, any Act of the Assembly providing for a convention to amend the Constitution is unconstitutional and void.

An argument in favor of a convention has been suggested which is not specifically met in the preceding. It is this, namely: that though the General Assembly has no power to introduce amendments and carry them to their consummation in any manner not provided in the Constitution, it nevertheless has power to call a convention to frame a new constitution for submission to the people. The argument is, in our opinion, rather specious than sound. The convention, if called, would be confined by the Constitution of the United States to the formation of a constitution for a republican form of government, and our present Constitution contains the fundamental provisions, the great ground plan, of such a form of government as it is known throughout the Union. Any changes which are in contemplation are merely changes of superstructure or detail. Our Constitution, too, contains in its Bill of Rights the great historic safeguards of liberty and property, which certainly



no convention would venture either materially to alter or to abolish. Any new constitution, therefore, which a convention would form, would be a new constitution only in name; but would be in fact our present Constitution amended. It is impossible for us to imagine any alteration, consistent with a republican form of government, which cannot be effected by specific amendment as provided in the Constitution.

Again, it has been maintained that the General Assembly has power to call a convention under section 10, of article 4, which provides that "the General Assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this Constitution." But, under this section, the General Assembly can only exercise powers which are not prohibited; and, if the provision for amendment is, as we think it is, exclusive, then a power to call a convention is prohibited by implication, and, as was clearly shown in *Taylor v. Place*, 4 R. I. 324, an implied is as effectual as an express prohibition.

Finally, it has been contended that there is a great unwritten common law of the States, which existed before the Constitution, and which the Constitution was powerless to modify or abolish, under which the people have the right, whenever invited by the General Assembly, and as some maintain, without any invitation, to alter and amend their constitutions. If there be any such law, for there is no record of it, or of any legislation or custom in this State recognizing it, then it is, in our opinion, rather a law, if law it can be called, of revolutionary than of constitutional change. Our Constitution is, as already stated, by its own terms, "the supreme law of the State." We know of no law, except the Constitution and laws of the United States, which is paramount to it.

We think the foregoing is in effect, if not in form, an answer to the questions propounded to us in the resolutions. The questions are extremely important, and we should have been glad of an opportunity to give them a more careful study, but under the request of the Senate for our opinion, "without any unnecessary delay," we have thought it to be our duty to return our opinion as soon as we could, without neglecting other duties, prepare it.

THOMAS DUFFEE,  
CHARLES MATTESON,  
JOHN H. STINESS,  
P. E. TILLINGHAST,  
G. M. CARPENTER, JUN.<sup>1</sup>

<sup>1</sup> For the practice in different States, see a valuable pamphlet, called out by this opinion, entitled "The methods of changing the Constitutions of the States, especially that of Rhode Island" (Boston: Alfred Mudge & Son, Printers, 1885), written by Hon. Charles S. Bradley, formerly Chief Justice of Rhode Island. See also the comments of Judge Jameson on this opinion in *Const. Conventions* (4th ed.), ss. 573, 574, et seq. — Ed.

## WELLS v. BAIN.

## SUPREME COURT OF PENNSYLVANIA. 1874.

[75 Pa. St. 39.]<sup>1</sup>

DECEMBER 2d, 1873. At Nisi Prius, before GORDON, J., with AGNEW, C. J., SHARSWOOD, WILLIAMS, and MERCUR, JJ., as assessors. The matter considered arose upon two bills in equity in the Supreme Court, No. 13 and No. 14, to January Term, 1874.

No. 13 was a bill filed by Francis Wells and others, citizens and voters of Philadelphia, against James Bain and others, commissioners of the city of Philadelphia, and Edwin H. Fitler and others, commissioners of election under an ordinance of the convention to revise and amend the Constitution of Pennsylvania.

No. 14 was a bill filed by John H. Donnelly, an inspector of elections of the Fifth Ward of Philadelphia, against Edwin H. Fitler and others, commissioners of elections, &c., as above stated.

An Act of the Legislature of June 2, 1871, submitted to the people the question of "calling a convention to amend the Constitution of Pennsylvania." In pursuance of the popular vote in the affirmative, an Act of April 11, 1872, provided for the election of delegates to such a convention, fixing the number of members, the manner of voting, and other details. The convention was to meet on the second Tuesday of November, 1872, and was to "have power to propose to the citizens of this Commonwealth, for their approval or rejection, a new constitution or amendments to the present one, or specific amendments to be voted for separately." It was provided that "the election to decide for or against the adoption of the new constitution or specific amendments shall be conducted as the general elections of this Commonwealth are now by law conducted."

The Constitutional Convention prepared a new constitution, and passed an "ordinance" for submitting it to the people which departed from the provisions of the statute of April 11th; it named, for example, five persons (not the regular officials) who should act as commissioners of election in Philadelphia.

Bill No. 13, above mentioned, averred that the commissioners named in this ordinance were proposing to hold an election in Philadelphia on the sixteenth of December, 1873, under the authority of the ordinance, and contrary to certain provisions of the statute of April 11th, and that Bain and other city commissioners of Philadelphia were proposing to expend the money of the city for the purposes of such election; and it prayed for an injunction restraining the said persons from holding the election and paying out the money.

Bill No. 14 averred that the plaintiff was a duly appointed inspector of elections in the Fifth Ward of Philadelphia, and, after setting forth

<sup>1</sup> The statement of facts is condensed. — ED.

the same state of facts contained in the other bill, it alleged that the defendants, the commissioners under the ordinance of the convention, designed to prevent him and the other election officers of Philadelphia from performing their duties, and prayed for an injunction to restrain the defendants from interfering with the plaintiff in the exercise of their office.<sup>1</sup>

The cases were argued by *R. S. Ashurst, J. E. Gowen, and B. H. Brewster*, for the plaintiffs, and by *C. R. Buckalew, W. H. Armstrong, and G. W. Biddle*, for the defendants.

The opinion of the court was delivered, December 6th, 1873, by

AGNEW, C. J. Since the Declaration of Independence in 1776, it has been an axiom of the American people that all just government is founded in the consent of the people. This is recognized in the second section of the Declaration of Rights of the Constitution of Pennsylvania, which affirms that the people "have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may think proper." A self-evident corollary is, that an existing lawful government of the people cannot be altered or abolished unless by the consent of the same people, and this consent must be legally gathered or obtained. The people here meant are the whole, — those who constitute the entire State, male and female citizens, infants and adults. A mere majority of those persons who are qualified as electors are not the people, though when authorized to do so, they may represent the whole people.

The words "in such manner as they may think proper," in the Declaration of Rights, embrace but three known recognized modes by which the whole people, the State, can give their consent to an alteration of an existing lawful frame of government, *viz.* : —

1. The mode provided in the existing constitution.
2. A law, as the instrumental process of raising the body for revision and conveying to it the powers of the people.
3. A revolution.

The first two are peaceful means through which the consent of the people to alteration is obtained, and by which the existing government consents to be displaced without revolution. The government gives its consent, either by pursuing the mode provided in the Constitution, or by passing a law to call a convention. If consent be not so given by the existing government the remedy of the people is in the third mode, — revolution.

When a law becomes the instrumental process of amendment, it is not because the legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an authorized consent of the whole people, the entire State, can be lawfully obtained in a state of peace. Irregular action,

<sup>1</sup> The report does not state in what manner the pleadings were concluded, or how the case was shaped. — Ed.

whereby a certain number of the people assume to act for the whole, is evidently revolutionary. The people, that entire body called the State, can be bound as a whole only by an act of authority proceeding from themselves. In a state of peaceful government they have conferred this authority upon a part to speak for the whole only at an election authorized by law. It is only when an election is authorized by law, the electors, who represent the State or whole people, are bound to attend, and if they do not, can be bound by the expression of the will of those who do attend. The electors who can pronounce the voice of the people are those alone who possess the qualifications sanctioned by the people in order to represent them, otherwise they speak for themselves only, and do not represent the people.

The people, having reserved the right to alter or abolish their form of government, have, in the same declaration of their rights, reserved the means of procuring a law as the instrumental process of so doing. The twentieth section is as follows: —

“The citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address, or remonstrance.”

If the legislature, possessing these powers of government, be unwilling to pass a law to take the sense of the people, or to delegate to a convention all the powers the people desire to confer upon their delegates, the remedy is still in their own hands; they can elect new representatives that will. If their representatives are still unfaithful, or the government becomes tyrannical, the right of revolution yet remains. To what extent the Constitution of the United States controls this it is unnecessary now to inquire.

It is not pretended that the late convention sat as a revolutionary body, or in defiance of the existing government, and it did not proceed in the mode provided for amendment in the Constitution, that being a legislative proceeding only. It was, therefore, the offspring of law. It had no other source of existence. The process was an application or petition to the legislature to call a convention; the passage of a law to gather the sense of the people on the question whether a convention should be called; an election authorized by this law to take the sense of the whole people on this question, and, finally, the passage of a law to call the convention and define its powers and duties. A law is the only form in which the legislature, the body invested with the powers of government, can act, and thereby its own consent be given and revolution avoided. The people having adopted a proceeding by law as the means of executing their will, having acted under it and chosen their delegates by virtue of its authority, submitted themselves to it, as their own selected and approved means of carrying out peacefully their purpose of amendment. The law, being thus the instrument of their own choice to express their will, necessarily became the channel of their authority. Having furnished no other means of arriving at their

will, it is the only channel through which it has been conveyed. The law, therefore, being the instrument of delegation, this warrant to the delegates from the people becomes the only chart of their powers. The will of the people has been expressed in no other form, and the powers of the delegates, therefore, come in no other wise.

It will not do to assert that the whole original power of the people was conferred by the election. This election itself was a part of the instrumental process of the law, the means provided by this very law, of selecting the delegates. The law was the warrant for their election, and expressed the very terms chosen and adopted by the people, under which they delegated their power to these agents. The delegates possess no inherent power, and when convened by the law at the time and place fixed in it, sit and act under it, as their letter of attorney from the people themselves, and can know and discover the will of the people only so far as they can discern it through this the only warrant they have ever received to act for the people. If they claim through any other source, they must be able to point to it.

Outside of the law to take the sense of the people whether a convention should be called, and the law to call the convention, no other source has been or can be shown. To make this more distinct, let us suppose a voluntary election unauthorized by law, and delegates elected. It is plain a convention composed of such delegates would possess no power to displace the existing government, and impose a new constitution on the whole people. Those voting at the unauthorized election had no power to represent or to bind those who did not choose to vote. A majority of the adult males having the qualifications of electors can bind the whole people only when they have authority to do so.

To make this still more plain. Suppose a constitution formed by a volunteer convention, assuming to represent the people, and an attempt to set it up and displace the existing lawful government. It is clear that neither the people as a whole nor the government having given their assent in any binding form, the executive, judiciary, and all officers sworn to support the existing constitution would be bound, in maintenance of the lawfully-existing institutions of the people, to resist the usurpation, even to the whole extent of the force of the State. If overpowered, the new government would be established, not by peaceful means, but by actual revolution.

It follows, therefore, that in a state of peace a law is the only means by which the will of the whole people can be collected in an authorized form, and the powers of the people can be delegated to the agents who compose the convention. The form of the law is immaterial in this question of derivative authority. It may be a law to confer general authority or one to confer special authority. It may be an invitation in the first place, as was the Act of 1789, under which the convention of 1790 was convened, and an authority to the people to meet in primary assemblies to select delegates and confer on them unrestricted powers; or it may be a law to take the sense of the people on the

question of calling a convention, and then a law to make the call and confer the powers the people intend to confer upon their agents. The power to pass the law carries with it of necessity that to frame and declare the terms of the law. The terms of delegation, which the people themselves declare, when acting under and by virtue of the law which they have called to their aid, as the instrumental process of conferring their authorities and reaching their purpose of amendment, become of necessity the terms of their own will. All outside of this channel is revolutionary, for it has neither the consent of the government nor of the people who have called the government to their aid and acted through it. The process of amendment being through the instrumentality of legislation, these laws must be enacted in the forms of the Constitution and be interpreted by the rules which govern in the interpretation of laws.

The next inquiry is, What powers of the people were conferred upon the late convention? A change in the fundamental relations of the people and of that sacred compact which they have instituted to guard and protect their own rights and interests is one of vast, indeed most solemn import; for to impose a new constitution without authority, or to usurp powers not delegated, may lead to bloodshed and ruin. The power to act, then, should be clearly conferred. The sacred fire from the altar of the people's authority cannot be snatched by unhallowed hands.

The present inquiry is not how much power may be conferred by law, but what power was conferred on this convention? A law must be passed according to the forms of the Constitution. One of these is that no bill shall contain "more than one subject, which shall be clearly expressed in the title." The title of the Act of June 2d, 1871, is "An Act to authorize a Popular Vote upon the Question of calling a Convention to amend the Constitution of Pennsylvania." The text of the Act is: "That the question of calling a convention to amend the Constitution of this Commonwealth be submitted to a vote of the people at the general election, to be held," &c. The one subject of both title and text is the question of calling a convention. That question was authorized to be submitted to a popular vote. In that election each elector expressed his individual opinion on that question, and that alone, by voting "for a convention" or "against a convention." This question was answered in the affirmative by a majority of votes, and the people, answering the legislature, said: "You may call a convention." This was all the vote expressed. Each vote expressing the opinion of the elector on that question, the majority expressed no more; for the majority was composed of the sum total of the votes on that side. Thus an analysis of the Act, both in its title and its text, demonstrates that the vote was not a delegation of power, except to the legislature. There is no principle of sound interpretation which can extend the voice of the elector or the sum total of those voices, beyond the question each was called to answer. The result of that vote, therefore, was that the

legislature might call a convention. It was not in itself a call, nor did it declare when, how, or on what terms the call should be made. That, the very answer to the question proposed to the electors, necessarily left to those who asked their judgment on the propriety of making the call.

It was not even a mandate, further than the moral force contained in an expressed desire of the people. It is very evident, had the matter dropped there, and the legislature had made no call, no convention and no terms would ever have existed. Not a line, nor a word, nor a syllable in this Act expresses an intent of the people to make the call themselves, or on what terms it shall be made, or what powers should be conferred. Did the people by this Act, without an expressed intent, and by mere inference, intend to abdicate all their own power, their rights, their interests, and their duty to each other in favor of a body of mere agents, and to confer upon them, by a blank warrant, the absolute power to dictate their institutions, and to determine finally upon all their most cherished interests? If the argument be admitted for an instant that because nothing was said in this law on the subject of delegation, therefore greater powers were conferred than were granted in the subsequent Act of 1872, then all power belonging to the people passed, and they did grant by it the enormous power stated. Then, by a covert intent, hidden in the folds of this Act, the people delegated power to repeal all laws, abolish all institutions, and drive from place the legislature, the Governor, the judges, and every officer of the Commonwealth, without submitting the work of the delegates to the ratification of the people. If by an ordinance under a power derived from this Act of 1871, the delegates can set aside the lawfully-existing election laws for Philadelphia, where shall their power end? Can they draw money from the treasury to pay their own salaries? Can they seize and condemn a hall for their own use under the power of eminent domain? It is not possible, by any sound rule of interpretation, natural or civil, we can attribute to the Act of 1871 such an enormous, fearful, portentous delegation of power, founded on a vote upon the mere question of calling a convention. The result of the vote on this question declared the sense of the greater number of electors that a convention might be called. But how called? It was not itself a call. It left that to those invested with the powers of government. In and of itself it conferred no authority upon the delegates, but left that to a subsequent Act. The call proceeding from the legislature was necessarily by means of a law, for in no other form can the legislative will be expressed. When the people called in legislative aid to procure the call of a convention, they knew, therefore, that a law could be the only instrumental process the legislature could give; and a law being invoked, they knew that the power to legislate carried with it the power to frame the terms of the law. They knew still more, when they accepted the law as the means of making the call, that they adopted its terms by acting under it. When, therefore, they, in 1872, elected delegates under the Act of

1872, they elected them under the terms and provisions of that law, and none other, for there was no other law under which an authorized and binding election was or could be had. The people themselves, therefore, ratified and adopted the terms of the Act of 1872, as the terms on which they delegated their powers to those elected under it. The delegates so elected are clearly estopped, by the record itself, from denying the terms under which they hold their seats, for they hold them under the Act of 1872, and no other. The entire process of raising a convention and conferring upon it the powers of the people was a matter of law, in a state of peace, under the forms of the Constitution, through which the consent both of the people and of the existing government was given to prevent the convention from being or becoming a revolutionary body.

Accordingly, the Act of April 11th, 1872, is entitled "An Act to provide for calling a Convention to amend the Constitution." The text of the Act is, "that at the general election to be held, &c., there shall be elected by the qualified voters of the Commonwealth, delegates to a convention to revise and amend the Constitution of the State," &c. The Act then provides for the election, the assembling of the delegates, their powers and duties, and the submission of the Constitution or amendments agreed upon to a vote of the people for adoption or rejection. When the people voted under this law, did they not vote for delegates upon the express terms that they should submit their work to the people for approval? Did not every man who went to the polls do so with the belief in his heart that, by the express condition on which his vote was given, the delegates could not bind him without his subsequent assent to what the delegates had done? On what principle of interpretation of human action can the servant now set himself up against the condition of his master and say the condition is void? Who made it void? Not the electors; they voted upon it. The people required the law, as the act of the existing government, to which they had appealed under the Bill of Rights, to furnish them legal process to raise a convention for revision of their fundamental compact, and without which legal process the act of no one man could bind another. This law, being unrepealed, and being acted upon by the people, became their own delegation of authority, — the chart of the delegates to guide and control them in the duties they were elected to perform as the servants of the people. Without this legislation the convention had not existed; and to exist on terms not found in or contrary to the law, is to seek for a grant of powers to be found nowhere else, except in a state of revolution, and therefore do not exist in this peaceful process of amendment.

The absolute necessity of the convention to claim the protection of the Act of 1872 is seen in another view. Of the one hundred and thirty-three members of this body, less than one hundred in number were elected by the people. Some never received a single vote, but sat by the appointment of men themselves not elected by the people at



large. It is not meant to discuss the wisdom or the merits of the so-called limited system of voting, by which a majority of the electors are prevented from voting against persons seeking to represent them; but the purpose now is to show that without the authority of this very Act of 1872, more than thirty-three members of the body had no warrant whatever to represent the people. On what principle of right, dominion, or power, had these persons any claim to exercise the power of the people, and by their votes, perhaps, to fix upon a people they do not represent the most odious features of a proposed constitution? Is it not clear that their whole delegated power to speak and to vote for the people comes from the force and effort of the statute? They have that, and none other.

In considering this question of delegated power some are apt to forget that the people are already under a constitution and an existing frame of government instituted by themselves, which stand as barriers to the exercise of the original powers of the people, unless in an authorized form. They glide insensibly into the domain of abstract rights, and clothe mere agents with primordial power. But delegated authority is derived, and those who claim it must show whence and how they derived it. Three and a half or four millions of people cannot assemble themselves together in their primary capacity, — they can act only through constituted agencies. No one is entitled to represent them unless he can show their warrant, how and when he was constituted their agent. The great error of the argument of those who claim to be the people or the delegates of the people, is in the use of the word "people." Who are the people? Not so many as choose to assemble in a county, or a city, or a district, of their own mere will, and to say, We, the people. Who gave them power to represent all others who stay away? Not even the press, that wide-spread and most powerful of all subordinate agencies, can speak for them by authority. The voice of the people can be heard only through an authorized form, for, as we have seen, without this authority a part cannot speak for the whole, and this brings us back to a law as the only authority by which the will of the whole people — the body politic called the State — can be collected under an existing lawful government. To wander outside of this channel is to run in search of original powers, which, though possessed by the people, they have conferred in no other form. If the power be delegated, it must be seen in the derivation, otherwise it does not exist. If, then, the delegates elected by the people themselves, under the Act of 1872, have greater powers than are contained in it, when, where, and how did they obtain them? It is not in the Act of 1871, for that, as we have shown, decided but one question and conferred but one power, to wit, that a convention might be called, and that the legislature might call it. There is no other source to which this convention can appeal, and not being found there it is found nowhere.

This brings us to an examination of the powers conferred by the Act of 1872, as the dernier resort. The power claimed for the convention

is, by ordinance, to raise a commission to direct the election upon the amended constitution in the city of Philadelphia, and to confer power on this commission to make a registration of voters, and furnish the lists so made to the election officers of each precinct; to appoint a judge and two inspectors for each division, by whom the election therein shall be conducted. This ordinance further claims the power to regulate the qualifications of the officers thus appointed to hold the election and to control the general returns of the election. It is clear, therefore, that the ordinance assumes a present power to displace the election officers now in office under the election laws for the city, to substitute officers appointed under the authority of the convention, and to set aside these election laws so far as relates to the qualification of the officers and the manner in which the general returns shall be made, and in other respects not necessary to be noticed. The authority to do this is claimed under the fifth section of the Act of 1872. . . .

Now we come to the sixth section, which begins a different subject. "The election to decide for or against the adoption of the new Constitution, or specific amendments, shall be conducted as the general elections of this Commonwealth are now by law conducted." Thus the legislature said to the convention in these three sections—You shall have power to propose your work in three forms; you shall have power to determine the time and the manner in which these propositions shall be submitted; but the election by the citizens shall be conducted as the law itself directs as to general elections. The sixth section, as to how the election on the propositions submitted shall be conducted, is mandatory, and is so for the best of reasons,—it is the only legally authorized means of taking the sense of the people upon adoption of the amendments which can bind the whole people. In this way only can a majority of voters, who are not a majority of the people, bind them as the body politic or State. The legislature intended that the election should be conducted by known officers legally elected, and should be governed by a known system of laws with which the people are familiar, and thereby that they should both know and respect the authority under which the election should be held. No implication can be drawn from the word "manner" to contradict the plain and positive enactment that the election shall be conducted according to the laws governing general elections. It would violate the plainest rules for the interpretation of statutes to make the merest inference stand higher than an intent expressed in distinct language. It is, therefore, clear to our minds that the ordinance relating to the election in the city of Philadelphia is flatly opposed to the Act of 1872, and is therefore illegal and void. The prospective validation in the 32d section of the schedule only betrays the doubt the convention itself had of the validity of the ordinance in this respect.

The next question is one of great importance, but stands on a very different footing from that upon the ordinance,—I mean the alleged refusal of the convention to submit the judiciary article separately to a

vote of the people. The convention was clothed with express power to act upon the question of submitting the amendments in whole or in part. It is a deliberative body, having all the necessary authority to make rules for its own procedure, and to decide upon all questions falling within the scope of its authority. The power over the manner of submitting amendments is expressly conferred in the fifth section. It is true the law gives to one third of all the members a right to require a separate submission of any amendment. But while this right is awarded to a minority of the body, it is one upon which the convention itself must act, and it must act according to its own rules of procedure. The question of a separate submission being one committed to the whole body, of which the requiring third is itself a part, it must be presumed that the decision of the body as a whole was rightly made, and either that the request was not made by a full one third of all the members, or, if made by one third, it was not in a regular or orderly way. It would be a violent presumption to suppose that the body would wilfully disregard their own oaths as well as a full and orderly request. And if they did this wrong, no appeal is given to the judiciary, and the error can be corrected only by the people themselves, by rejecting the work of the convention. If the people, notwithstanding, choose to ratify their work, with them lies the consequence. Mere errors of procedure will then be of no avail. The convention having in that matter acted within the scope of its undoubted power, we must take its decisions as final, and leave correction to the power to which it belongs.

Not to omit to notice the arguments drawn from precedents, we think none referred to throw much light on the general question in these cases, — this power of the convention to pass the ordinance setting aside the election laws governing the city of Philadelphia and substituting provisions of its own. Even the proceedings in 1789 in our own State furnish a precedent of but little service. There the legislature not only invited the action of the people in primary assemblies, but in advance committed to their hands all the authority legislation can confer to act in those assemblies. The convention was summoned without restriction, and acted without trammel, while the people reserved no power of ratification, and subsequently disposed of all questions of power by living under and acting upon the Constitution, thereby ratifying the work of the convention in the most efficacious manner. The question before us is, can the convention, before they either proclaim a constitution themselves, if they have the power, or before any ratification, if they have not, pass an ordinance to repeal an existing system of law on a particular subject? This is a question of power, not of wisdom. However wise the substitution of their own election machinery for that provided by law for this city may be, the question is not for us. We can decide only the question of power. At last, therefore, we must come to the decision on principle, and in the light of reason, having a due regard to the rights, interests, welfare, and peace of a people living under a recognized government of their own choice,

and seeking to amend it in a peaceful way, and to such extent as they may deem salutary and wise.

The question of jurisdiction has been reserved for the conclusion. The first remark to be made is, that all the departments of government are yet in full life and vigor, not being displaced by any authorized act of the people. As a court we are still bound to administer justice as heretofore. If the acts complained of in these bills are invasions of rights without authority, we must exercise our lawful jurisdiction to restrain them. One of our equity powers is the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals. *Page v. Allen*, 8 P. F. Smith, 338, and the authorities cited by counsel, are precedents sufficient to justify the exercise in this case. Here the court is asked to restrain a body of men attempting to proceed contrary to law, — to set aside the lawful election system of the city, and substitute an unlawful system in its place. Their acts are not only contrary to law, but are prejudicial to the interests of the community, by endangering the rights of all the electors, through means of an illegal election held by unauthorized officers. In *Patterson v. Barlow*, 10 P. F. Smith, 54, the aid of the court was asked, not to prevent acts contrary to law, but to strike down the only lawful system of election in the city, and thereby to disfranchise all its citizens, for all other election laws had been actually repealed. We said then it was more than doubtful how far private citizens can call for an injunction beyond their own invaded rights, or ask to restrain a great system of law in its public aspects. In this case we are called upon, not to strike down, but to protect a lawful system, and to prevent intrusion by unlawful authority. If this ordinance is invalid, as we have seen it is as to the city elections, the taxes of the citizens will be diverted to unlawful uses, the electors will be endangered in the exercise of their lawful franchise, and an officer necessary to the lawful execution of the election law ousted by unlawful usurpation of his functions.

The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers, it is not amenable for its acts, but when it assumes to legislate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the Declaration of Rights, to an open court and to redress at our hands.

In conclusion, we regret that the nature of the case requires prompt, instant action, and that the circumstances under which we act demand a written expression of our views. We gladly would have had more time for discussion among ourselves, and for the preparation of the opinion. As it is, we have given to the subject all our most anxious thoughts and

labor, and have arrived at the best conclusions honest convictions can reach.

[Injunctions were issued Dec. 5, 1873.]<sup>1</sup>

## WOODS'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1874.

[75 Pa. St. 59.]<sup>2</sup>

OCTOBER 9th, 1874. (At Pittsburg.) Before AGNEW, C. J., SHARSWOOD, WILLIAMS, MERCUR, and GORDON, JJ. Appeal from the Court of Common Pleas of Allegheny County: In Equity: No. 37, to October and November Term, 1874.

On the 2d of December, 1873, Robert Woods and Reese Owens filed a bill against Matthew S. Quay, Secretary of the Commonwealth of Pennsylvania, John H. Hare, sheriff of Allegheny County, James G. Murray, and others, commissioners of Allegheny County.

The bill set forth that the plaintiffs were citizens and tax-payers of Allegheny County, and of the Commonwealth of Pennsylvania; it also set forth the Act of June 2d, 1871, and other matters relating to the convention, which are found in the case of *Wells v. Bain*.

The bill charged that M. S. Quay, Secretary of the Commonwealth, declared that he would comply with the provisions of the aforementioned "ordinance" of the convention, imposing duties upon him in relation to the submission of the amended Constitution to a popular vote; that John H. Hare, sheriff of the county of Allegheny, has published in sundry newspapers his proclamation for holding an election on the 16th of December next to pass upon the amendments, and that James G. Murray and others, commissioners of Allegheny County, had declared that they would perform the duties imposed on them by the aforesaid ordinance, &c. The prayer was for an injunction to restrain the defendants from acting in the premises as above set forth; that the Acts of June 2d, 1871, and April 11th, 1872, be declared unconstitutional and void; that the convention convened under the Act of 1872 was an illegal body and its acts without authority of law; that the "ordinance" of the convention was unconstitutional and void. . . .

The defendants demurred to the bill, and the case was heard on bill and demurrer.

The court (STOWE, J.) dismissed the bill in the following opinion: —  
. . . I have no difficulty in concluding that if the Acts of Assembly in question are unconstitutional and void, the convention was an illegal

<sup>1</sup> See comments on this case and some additional facts in Jameson, Const. Conv. (4th ed.) ss. 409 a-410, and ss. 520 a, 520 b. — Ed.

<sup>2</sup> The statement of facts is condensed. — Ed.

body, and its acts revolutionary, and that in such case it would be the duty of courts to exercise all their authority to prevent its mandates being carried into effect to the injury of any individual; that the legislature would be bound to enact such laws as might be necessary to punish any attempt to force upon the people its revolutionary work, and the executive officers of the State to use all their power, civil and military, to suppress it.

If, however, in the face of all this, such force, moral or physical, was brought to bear as to overawe or compel the submission of the legal authorities of the State, then, indeed, the arm of the law would be paralyzed, and the proposed constitution would become effective, not by the law, but by that higher right of revolution which is above all law, but is nowhere recognized by it. Courts can know nothing by anticipation. They are bound to determine the law as it is previous to the successful accomplishment of revolution, as though such a fact were impossible; but when accomplished and duly recognized by the political powers of the government, the courts have no alternative but to accept the fact without question and act accordingly.

While, then, courts must recognize the powers that be, though the product of revolution, they are bound to use all their legitimate authority to suppress acts actually or ostensibly revolutionary, as though they were simply rebellious and could never become legitimate.

Coming, then, to the question of the constitutionality of the Act to authorize a popular vote upon the question of calling a convention to amend the Constitution, approved June 2d, 1871, and also the Act passed subsequent to the election, held in pursuance of the same, entitled "An Act to provide for calling a Convention to amend the Constitution," approved April 11th, 1872, raised by the 2d, 3d, 4th, 5th, 6th, and 7th sections of complainants' bill, it is claimed that they are both unconstitutional and invalid, because:—

1. There is no power given by the present Constitution to the legislature authorizing such a proceeding.
2. There is a different method provided by the Constitution, by which it may be amended, and, therefore, upon well-recognized principles of law, the legal conclusion arises that no other exists.

It cannot be claimed that the authority for the legislation and proceedings taken in reference to calling this convention are expressly set out in the Constitution, but it is argued that the power arises under the second section of the Declaration of Rights, which declares that "all power is inherent in the people and all free governments are founded on their authority, and instituted for their peace, safety, and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such a manner as they may think proper," all of which is, *inter alia*, excepted out of the general powers of government, and is "forever to remain inviolate."

It is difficult to see how the withholding of power from the govern-

ment can, strictly speaking, create a right in the legislature from which it is thus withheld, to exercise that power; but if it should appear that such power exists above and before the Constitution as a great natural and indefeasible right, and has been so recognized and acted upon frequently as a fundamental principle underlying all free government, this provision will sufficiently appear to be a solemn declaration of the existence of such a right, and may in ordinary parlance fairly be said, without any great breach of legal accuracy, to confer a power under the Constitution.

Before, however, entering into a consideration of this question, it will be necessary to examine whether there is anything in the Constitution, as urged in the second proposition, which directly or by necessary legal implication takes away such a fundamental right as we have suggested, in case it existed, where there is no constitutional restriction.

It is urged, and with much apparent force, that because the Constitution in the tenth article "of amendments" provides a certain and carefully defined way for amending the fundamental law, the well-recognized legal maxim ordinarily applied to the construction of deeds and written instruments, as well as Acts of legislation, *Expressio unius est exclusio alterius*, leads to the fixed legal presumption that no amendment can, under the Constitution, be made to it, except in the way thus especially provided.

This rule enunciates one of the first principles to the construction of any ordinary instruments between parties: Lord Denman, C. J., 5 Bing. N. C. 185; but great caution is requisite in its application: *Price v. The Great Western Railway Co.*, 16 M. & W. 244; Broom's Legal Maxims, 595; and it has long been settled in commercial transactions that custom and usage are allowed to control or rebut the implication arising under the rule. . . .

Mr. Jameson, in his work on Constitutional Conventions, p. 573, says, with great force, upon this question: "Viewed upon principle, were there no authority upon the point, it would be doubtful whether, dealing in great questions of politics and government, the same maxim ought to prevail which regulates the construction of contracts between man and man. As a matter of speculation it may be admitted that the rule expresses the weight of probability equally in cases of great and small magnitude. But there is always a doubt; and between the cases indicated there is the wide difference, that in ordinary contracts it is possible to enforce the construction which the courts shall pronounce the true one, whilst in the case of constitutional provisions regulating great organic movements, to hold such a maxim applicable would be, by presenting barriers to the attainment of what the people generally desire, to make that revolutionary which perhaps was not so. Where the intention of the framers of a constitution is doubtful, the people assuming power under the broader construction should have the benefit of the doubt; and that all the more because in opposition to them our courts are comparatively powerless. It is infinitely better where no principle

is violated, that a constitution should be so construed as to make their action legal rather than illegal."

So far as judicial opinion is concerned, it has been said by the Supreme Court of New York that the maxim is to be applied to ordinary contracts rather than constitutional provisions: *Barto v. Hirmrod*, 4 Selden, 483; while the judges of the Supreme Court of Massachusetts have expressed a different opinion (6 Cushing, 573), holding that under the Constitution of Massachusetts, containing a provision substantially like our own, no power existed to amend, except as provided in the Article of Amendments. As a matter of history, however, a convention was called by the legislature in 1853, twenty years after this opinion was given, to propose a constitution; and while the question was raised as to the legality of such convention, it was ably vindicated by the best lawyers in the State, among them Choate, Parker, and Morton, the latter one of the judges of the court at the time the opinion was given; and a constitution prepared and submitted to the people.

Turning now to the history of the government of the various States, for the purpose of discovering what the usage in such cases has been, we find the practice has been so frequent and uniform as clearly to indicate what the common understanding of the people, lawyers and laymen, has been in regard to this question.

So far as I am able to learn, there had been, in 1865 (throwing out of consideration the rebel States during 1861, and afterwards while undergoing reconstruction), twenty-five constitutional conventions called by the legislatures of the various States, without any special authorization in their constitutions. In Georgia, January 4th, 1789, May 4th, 1789, and 1838; in South Carolina, 1790; in New Hampshire, 1791; in New York, 1801, 1821, and 1846; in Connecticut, 1818; in Massachusetts, 1829, 1853; in Rhode Island, 1824, 1834, 1841, and 1842; in Virginia, 1829, 1854, and 1864; in North Carolina, 1835; in Pennsylvania, 1837; in New Jersey, 1844; in Missouri, 1845, 1861, and 1865; in Indiana, 1850.

Mr. Webster stated in 1848, in his argument before the Supreme Court of the United States, in the case of *Luther v. Borden*, "that of the old thirteen States, their constitution with but one exception contained no provision for their own amendment, yet there is hardly one that has not altered its constitution, and it has been done by conventions called by the legislature, as an ordinary exercise of power." If this is true, and my own examination, so far as, with the limited time and opportunity since the argument of this case, I have been able to make it, has verified it, as well as shown the continuation of the same practice to the present day, — it would seem as though the question as to whether the calling of a constitutional convention was a legal exercise of power by the legislature, should now be considered by all judicial tribunals as settled so firmly as a part of the common law of our governments, that any attempt to disturb it at this day would savor more



of revolution than legitimacy. He would be bold, indeed, who would now assert that all these conventions were usurpations, and that all the constitutions proposed by them and adopted by the people were revolutionary.

The conclusion that I have drawn from all this is, that there is underlying our whole system of American government a principle of acknowledged right in the people to change their constitutions, except where especially prohibited in a constitution itself, in all cases and at all times, whether there is a way provided in their constitution or not, by the interposition of the legislature, and the calling of a convention, as was done in the case in hand.

The offspring of revolution originally, but restrained and modified by the necessity arising out of the new principle established in this country, by the accomplishment of our national independence, that the people are the government, and not the king, and the source of all political power, — it has become legitimated, and without mention in our constitutions, is as much the law of the land as if specifically set out in them; and that as a solemn recognition of this, and not as a revolutionary right, the section of the Declaration of Rights in our own, and similar clauses in other State constitutions, were inserted.

The somewhat similar expression contained in the Declaration of Independence was clearly revolutionary and so intended to be; but that was a paper published to the world to justify our refusal to submit longer to governmental authority, and spoke of the rights of the people, as against the oppression of constituted authorities; but in all instruments established by the people themselves for their own government, the only rational view is to consider it as above stated, — the introduction of a constitutional and legal revolution, by the consent of the constituted authorities of the State. This last is absolutely indispensable, as is now admitted by all. To give the force and effect of the law to the proceeding, it must emanate from the legislative authority, and be the result of its permission or direction. The only way the people can legally act under a constitution such as ours, is through their representatives, and therefore, no matter how many may favor a convention to change the Constitution, if one should be called, and convene without proper authority from the existing government, its action would be clearly illegal, and the result of illegitimate power. It follows, then, that the action of the legislature in authorizing a vote of the people on the question of the amendment of their constitution, and subsequently by another Act authorizing the election of delegates, was a legal exercise of legislative power, and constitutional, unless something in the Acts themselves is in conflict with some constitutional provision. . . .

The 8th, 9th, and 10th paragraphs of the bill complain of illegal acts done by the convention: first, in refusing a separate submission to a popular vote of the fifth article, relating to the judiciary, the contingency having arisen, under which, by an Act of the Legislature, they were bound to do so; and second, in altering several of the provisions

of the Bill of Rights contrary to the limitations imposed in the fourth section of the Act of April 11th, 1872; and third, in disregarding the Act of Assembly, under which the convention was called, in regard to submitting the amended Constitution to a vote of the people, and ordaining a different method.

These objections are all consistent with the conclusions already arrived at, and if valid would raise further questions under the bill, notwithstanding what has already been said, and should therefore be considered.

In examining these questions, the first and second may be taken together.

Looking upon general principles at the real question involved, which is how far, if at all, a constitutional convention regularly called may legally disregard limitations imposed upon its actions by the legislature, I have no difficulty in arriving at what seems to me to be the correct rule. A convention to amend the Constitution, without there is an express limitation as to the extent of their power, passed upon by the people in determining the question of amendment, has inherently, by the very nature of the case under the great principle peculiarly American, and *quasi* revolutionary in its character heretofore mentioned, absolute power, so far as may be necessary to carry out the purpose for which they were called into existence, by the popular will. Unless prohibited or restricted in the manner specified by the people, the convention has a right, untrammelled by mere legislative limitations, to propose to the people for their consideration and adoption any plan they may see fit. In saying this, we are not to be understood as saying that the convention is in any respect the supreme power of the State. We take it to be simply the attorney for the people, with plenary power to do what is required of it, but nothing beyond.

Subject to the limitation just mentioned, a constitutional convention, in the language of Mr. Wilson, in the Federal Convention of 1787, has the power to conclude nothing, but to propose anything.

Such, too, is the inevitable result of the views already expressed as to the purpose and effect of the second section of the Declaration of Rights. If it be taken as a constitutional recognition of the principle of legal revolution (so to speak), and of a popular power as we believe, the obvious result follows, that when once called into operation by proper authority, it cannot be subverted nor restrained by the legislature.

If this is correct, the convention was right in disregarding the limitations sought to be imposed upon its power, both as to what it should propose to change in the present Constitution, and how the proposal should be submitted to the people for their adoption or rejection.

The third point, raising the question of the right of the convention to provide a way by ordinance, different from and substantially repealing the Act of the Legislature, presents a very different question from the one just considered. It is, however, immaterial to the determination of the real issue in this case. Assuming it to be an excess of power,

the complainants can be in no wise affected by it as tax-payers. It is entirely immaterial to them in that respect, whether the ordinance is legal or illegal. Their only interest is that of knowing whether the convention had such a power or not, as a mere abstract question, which gives them no standing in court. So far as this county is concerned, there was no attempt by the convention to change the law made by the legislature. The election which will be held within our jurisdiction, and for which the complainants as tax-payers may be called upon to pay, will be held under what the complainants themselves say is the law, unless the submission of the proposed new Constitution is itself, as it stands to-day, illegal and unconstitutional.

There are other questions involved in the case, as to the standing and equity of the plaintiffs under this bill, in view of the relief prayed for, but the conclusions already expressed render it unnecessary to examine them.

The result is, the demurrer must be sustained and plaintiffs' bill dismissed.

The plaintiffs appealed to the Supreme Court, and assigned for error the decree sustaining the demurrer and dismissing the bill.

*R. Woods*, for appellants.

*R. B. Carnahan*, for appellees.

The opinion of the court was delivered, November 2d, 1874, by

AGNEW, C. J. The change made by the people in their political institutions, by the adoption of the proposed Constitution since this decree, forbids an inquiry into the merits of this case. The question is no longer judicial, but in affirming the decree we must not seem to sanction any doctrine in the opinion, dangerous to the liberties of the people. The claim for absolute sovereignty in the convention, apparently sustained in the opinion, is of such magnitude and overwhelming importance to the people themselves, it cannot be passed unnoticed. In defence of their just rights, we are bound to show that it is unsound and dangerous. Their liberties would be suspended by a thread more slender than the hair which held the tyrant's sword over the head of Damocles, if they could not, while yet their existing government remained unchanged, obtain from the courts protection against the usurpation of power by their servants in the convention. When they become complainants, the convention must defend and show their authority.

It was contended in the case of *Francis Wells et al. v. James Bain et al.*, involving the legality of an ordinance of the convention, argued at Philadelphia in December last (*antea*, p. 39), that the convention had the power to ordain ordinances having the present force of law; and the instant power to proclaim a constitution, binding without ratification, irrespective of the matter adopted by the people to exercise their right to alter or amend their frame of government. This imputed sovereignty in a convention called and organized under a law, as the very means adopted by the people to exercise their reserved right of

amendment, owing to the briefness of the time, was not discussed in that case with the fulness the importance of the question to the people demanded.

There is no subject more momentous or deeply interesting to the people of this State than an assumption of absolute power by their servants. The claim of a body of mere deputies to exercise all their sovereignty, absolutely, instantly, and without ratification, is so full of peril to a free people, living under their own instituted government, and a well-matured Bill of Rights, the bulwark and security of their liberties, that they will pause before they allow the claim and inquire how they delegated this fearful power, and how they are thus absolutely bound and can be controlled by persons appointed to a special service. Struck by the danger, and prompted by self-interest, they will at once distinguish between their own rights and the powers they commit to others. These rights it is, the judiciary is called in to maintain. The very rights of the people and freedom itself demand, therefore, that no such absolute power shall be imputed to the mere delegates of the people to perform the special service of amendment, unless it is clearly expressed, or as clearly implied, in the manner chosen by the people to communicate their authority.

A convention has no inherent rights; it exercises powers only. Delegated power defines itself. To be delegated it must come in some adopted manner to convey it by some defined means. This adopted manner, therefore, becomes the measure of the power conferred. The right of the people is absolute, in the language of the Bill of Rights, "to alter, reform, or abolish their government in such manner as they may think proper." This right being theirs, they may impart so much or so little of it as they shall deem expedient. It is only when they exercise this right, and not before, they determine, by the mode they choose to adopt, the extent of the powers they intend to delegate. Hence the argument which imputes sovereignty to a convention, because of the reservation in the Bill of Rights, is utterly illogical and unsound. The Bill of Rights is a reservation of rights out of the general powers of government to themselves, but is no delegation of power to a convention. It defines no manner or mode in which the people shall proceed to exercise their right, but leaves that to their after choice. Until then it is unknown how they will proceed, or what powers they will confer on their delegates. Hence we must look beyond the Bill of Rights to the mode adopted by the people, to find the extent of the power they intend to delegate. These modes were stated and discussed in the opinion in *Wells et al. v. Bain et al.*, *supra*. If, by a mere determination of the people to call a convention, whether it be by a vote or otherwise, the entire sovereignty of the people passes *ipso facto* into a body of deputies or attorneys, so that these deputies can, without ratification, alter a government and abolish its Bill of Rights at pleasure, and impose at will a new government upon the people without restraints upon the governing power, no true liberty remains. Then the servants sit

above their masters by the merest imputation, and a people's welfare must always rest upon the transient circumstances of the hour, which produce the convention and the accidental character of the majority which controls it. Such a doctrine, however suited to revolutionary times, when new governments must be formed, as best the people can, is wholly unfitted when applied to a state of peace and to an existing government, instituted by the people themselves and guarded by a well-matured Bill of Rights. . . .

The people have the same right to limit the powers of their delegates that they have to bound the power of their representatives. Each are representatives, but only in a different sphere. It is simply evasive to affirm that the legislature cannot limit the right of the people to alter or reform their government. Certainly it cannot. The question is, not upon the power of the legislature to restrain the people, but upon the right of the people, by the instrumentality of the law, to limit their delegates. Law is the highest form of a people's will in a state of peaceful government. When a people act through a law the act is theirs, and the fact that they used the legislature as their instrument to confer their powers makes them the superiors and not the legislature. The idea which lies at the root of the fallacy, that a convention cannot be controlled by law is, that the convention and the people are identical. But when the question to be determined is between the people and the convention, the fallacy is obvious. Such a metonymy may do for a flourish of rhetoric, but not for grave argument. The parties to the question are the people on the one hand and the convention on the other. The people allege an usurpation of power in this, that the convention seeks to bind them without their ratification. The question then is, what power was conferred? The judiciary sits to decide between them. The people having challenged their power to set a government over them at will, the agents must show their authority to do this. The latter put in evidence the Act of 1871 as their authority. Then the issue is, does the Act of 1871, simply ordering a convention to be called, confer this absolute, extraordinary, and dangerous power upon a body of men not yet called into being, and which can have neither being nor power except by the further act of the people through the instrumentality of a law? To make the law odious, it is assumed that the legislature is or may be corrupt. But this is aside from the true question of power. In a governmental and proper sense, law is the highest act of a people's sovereignty, while their government and constitution remain unchanged. It is the supreme will of the people expressed in the forms and by the authority of their constitution. It is their own appointed mode through which they govern themselves, and by which they bind themselves. So long as their frame of government is unchanged in its grant of all legislative power, these laws are supreme over all subjects unforbidden by the instrument itself. The calling of a convention, and regulating its action by law, is not forbidden in the Constitution. It is a conceded manner, through which the people may

exercise the right reserved in the Bill of Rights. It falls, therefore, within the protection of the Bill of Rights as a very manner in which the people may proceed to amend their constitution, and delegate the only powers they intend to confer, and as the means whereby they may, by limitation, defend themselves against those who are called in to exercise their powers. The legislature may not confer powers by law inconsistent with the rights, safety, and liberties of the people, because no consent to do this can be implied, but they may pass limitations in favor of the essential rights of the people. The right of the people to restrain their delegates by law cannot be denied, unless the power to call a convention by law, and the right of self-protection be also denied. It is, therefore, the right of the people and not of the legislature to be put by law above the convention, and to require the delegates to submit their work for ratification or disapproval. . . .

*Decree affirmed.*<sup>1</sup>

<sup>1</sup> Another American principle growing out of this, and just as important and well settled as is the truth that the people are the source of power, is that, when in the course of events it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things or of opinion, the legislative power provides for that ascertainment by an ordinary act of legislation. Has not that been our whole history? It would take me from now till the sun shall go down to advert to all the instances of it, and I shall only refer to the most prominent, and especially to the establishment of the Constitution under which you sit. The old Congress, upon the suggestion of the delegates who assembled at Annapolis in May, 1786, recommended to the States that they should send delegates to a convention to be holden at Philadelphia to form a constitution. No article of the old Confederation gave them power to do this; but they did it, and the States did appoint delegates, who assembled at Philadelphia and formed the Constitution. It was communicated to the old Congress, and that body recommended to the States to make provision for calling the people together to act upon its adoption. Was not that exactly the case of passing a law to ascertain the will of the people in a new exigency? And this method was adopted without opposition, nobody suggesting that there could be any other mode of ascertaining the will of the people.

My learned friend went through the constitutions of several of the States. It is enough to say that, of the old thirteen States, the constitutions, with but one exception, contained no provision for their own amendment. In New Hampshire there was a provision for taking the sense of the people once in seven years. Yet there is hardly one that has not altered its Constitution, and it has been done by conventions called by the legislature, as an ordinary exercise of legislative power. Now, what State ever altered its constitution in any other mode? What alteration has ever been brought in, put in, forced in, or got in anyhow, by resolutions of mass meetings, and then by applying force? In what State has an assembly, calling itself the people, convened without law, without authority, without qualifications, without certain officers, with no oaths, securities, or sanctions of any kind, met and made a constitution, and called it the Constitution of the State? There must be some authentic mode of ascertaining the will of the people, else all is anarchy. It resolves itself into the law of the strongest, or, what is the same thing, of the most numerous for the moment, and all constitutions and all legislative rights are prostrated and disregarded.

But my learned adversary says, that if we maintain that the people (for he speaks in the name and on behalf of the people, to which I do not object) cannot commence changes in their government but by some previous Act of legislation, and if the legislature will not grant such an Act, we do in fact follow the example of the Holy Alliance, "the doctors of Laybach," where the assembled sovereigns said that all

changes of government must proceed from sovereigns; and it is said that we mark out the same rule for the people of Rhode Island.

Now, will any man, will my adversary here, on a moment's reflection, undertake to show the least resemblance on earth between what I have called the American doctrine and the doctrine of the sovereigns at Laybach? What do I contend for? I say that the will of the people must prevail, when it is ascertained; but there must be some legal and authentic mode of ascertaining that will; and then the people may make what government they please. Was that the doctrine of Laybach? Was not the doctrine there held this, that the sovereigns should say what changes shall be made? Changes must proceed from them; new constitutions and new laws emanate from them; and all the people had to do was to submit. That is what they maintained. All changes began with the sovereigns, and ended with the sovereigns. Pray, at about the time that the Congress of Laybach was in session did the allied powers put it to the people of Italy to say what sort of change they would have? And at a more recent date, did they ask the citizens of Cracow what change they would have in their constitution? Or did they take away their constitution, laws, and liberties by their own sovereign act? All that is necessary here is, that the will of the people should be ascertained, by some regular rule of proceeding, prescribed by previous law. But when ascertained, that will is as sovereign as the will of a despotic prince, of the Czar of Muscovy, or the Emperor of Austria himself, though not quite so easily made known. A ukase or an edict signifies at once the will of a despotic prince; but that will of the people, which is here as sovereign as the will of such a prince, is not so quickly ascertained or known; and thence arises the necessity for suffrage, which is the mode whereby each man's power is made to tell upon the Constitution of the government, and in the enactment of laws.

One of the most recent laws for taking the will of the people in any State is the law of 1845, of the State of New York.<sup>1</sup> It begins by recommending to the people to assemble in their several election districts, and proceed to vote for delegates to a convention. If you will take the pains to read that Act, it will be seen that New York regarded it as an ordinary exercise of legislative power. It applies all the penalties for fraudulent voting, as in other elections. It punishes false oaths, as in other cases. Certificates of the proper officers were to be held conclusive, and the will of the people was, in this respect, collected essentially in the same manner, supervised by the same officers, under the same guards against force and fraud, collusion and misrepresentation, as are usual in voting for State or United States officers.

We see, therefore, from the commencement of the government under which we live, down to this late Act of the State of New York, one uniform current of law, of precedent, and of practice, all going to establish the point that changes in government are to be brought about by the will of the people, assembled under such legislative provisions as may be necessary to ascertain that will, truly and authentically.—*Mr. Webster's Argument in Luther v. Borden et al.*, Jan. 27, 1848. *Works of Daniel Webster*, vi. 227-229.

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<sup>1</sup> The Constitution of New York then existing (that of 1821, art. 8) provided for its own amendment by legislative proposal, in substantially the same way as the constitutions of Pennsylvania, Rhode Island, and Massachusetts above considered. The Massachusetts provision (Amendment IX.) was introduced by Mr. Webster himself. *Debates of Mass. Conv. of 1820*, 124.—Ed.

## SPOULE v. FREDERICKS.

SUPREME COURT OF MISSISSIPPI. 1892.

[69 Miss. 898.]<sup>1</sup>

*L. W. Magruder, and Gibson, Henry, & Bien*, for appellant. *Miller, Smith, & Hirsh*, for appellee.

WOODS, J., delivered the opinion of the court.

The validity of the Constitution of 1890 is called in question by counsel for appellee, in a supplemental brief filed recently, by consent of the court; and, as the challenge meets us on the threshold of the case, we proceed at once to its consideration, briefly. In support of this view of the invalidity of the Constitution, two propositions are asserted: 1. That a constitutional convention has power only to prepare or frame the body of a constitution, and that when prepared or framed the instrument is of no force or effect until ratified by a popular vote of the people; and the Constitution of 1890, having never been submitted to or ratified by the people, is invalid; and 2. That the changes made by the Constitution in the basis of suffrage are violative of the Act of Congress readmitting the State of Mississippi into the Union in the year 1870, and invalidate that instrument.

With confidence, we reject both propositions as unsound. It will be remembered that the case at bar is free from the difficulties which are supposed by some writers to arise out of a failure or refusal of a constitutional convention to yield to the direction of the legislature which summoned it that the Constitution framed shall be submitted to the people for ratification. The Act of the Legislature which provided for the assembling of the constitutional convention of 1890 declared that the end sought to be attained, the work to be done, was the revision and amendment of the Constitution of 1869, or the enactment of a new constitution; and it did not attempt to limit the powers of the convention by imposing, or seeking to impose, upon that sovereign tribunal the mere legislative will that the Constitution enacted should be submitted to the people for ratification. We have simply the case of a constitutional convention enacting a new constitution, and putting it into effect without an appeal to the people, in strict conformity to the legislative call which assembled.

We have spoken of the constitutional convention as a sovereign body, and that characterization perfectly defines the correct view, in our opinion, of the real nature of that august assembly. It is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral

<sup>1</sup> The statement of facts is omitted. — Ed.



body, for the good of the whole Commonwealth. The sole limitation upon its powers is that no change in the form of government shall be done or attempted. The spirit of republicanism must breathe through every part of the framework, but the particular fashioning of the parts of this framework is confided to the wisdom, the faithfulness, and the patriotism of this great convocation, representing the people in their sovereignty. The theorizing of the political essayist and the legal doctrinaire, by which it is sought to be established that the expression of the will of the legislature shall fetter and control the constitution-making body, or, in the absence of such attempted legislative direction, which seeks to teach that the constitutional convention can only prepare the frame of a constitution and recommend it to the people for adoption, will be found to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers. This theorizing will reduce that great body, which, in our State, at least, since the beginning of its existence, except for a single brief interval, in an exceptional period, by custom and the universal consent of the people, has been regarded as the repository and executor of the powers of sovereignty, to a mere commission, stripped of all power, and authorized only to make a recommendation.

Whatever may be the safer and wiser course, as to putting into operation the completed work of the constitutional convention, the opinions of the political theorists, which we are considering, will be found to rest upon grounds largely imaginary and fanciful. The constitutional convention itself, according to this theory, is looked upon with suspicion and distrust, as being the introduction into our governmental system of a revolutionary device; the chosen representatives of the sovereign people are dreaded, as likely to prove unfaithful to their mighty trust; and the liberties of the people are in danger of subversion. This succinct statement of the grounds of these political theorists will demonstrate the unreal foundation upon which their teachings rest. The general judgment of the people of our own State has practically and strikingly repudiated the theory, from the foundation of the government. The usage in Mississippi, with a solitary exception in an extraordinary conjuncture of public affairs, gives it no support. That the government has lived from its birth to this hour with no valid fundamental law on which to rest, except for a brief interval, cannot be true.

2. There is as little ground for the second branch of the contention. . . .

*Reversed and remanded.*<sup>1</sup>

<sup>1</sup> As to the previous constitutions of Mississippi, see the tables in Jameson's Const. Conv. (4th ed.) Appendix, 651. It appears there that three out of five, in all, were, in fact, submitted to the people. — Ed.

## KOEHLER AND LANGE v. HILL.

SUPREME COURT OF IOWA. 1883.

[60 Iowa, 543.]

APPEAL from Scott District Court. Saturday, April 21. Action to recover for beer sold and delivered by the plaintiffs to the defendant. Trial to the court, judgment for the plaintiffs, and the defendant appeals.

*Smith McPherson*, Attorney-General, *Peter A. Boyle*, *William E. Miller*, *J. A. Harvey*, *James F. Wilson*, *C. C. Nourse*, *John F. Duncombe*, and *Liston McMillan*, for appellant.

*Bills & Block* and *Wright*, *Cummins & Wright*, for appellees.

SEEVERS, J. At a special election held on the 27th day of June, 1882, the electors of the State, by a majority of about thirty thousand, ratified an amendment to the Constitution, which, it is claimed, had been previously agreed to by the Eighteenth and Nineteenth General Assemblies, prohibiting the manufacture and use of intoxicating liquors as a beverage, including ale, wine, and beer, as therein provided.

The question is fairly presented in the record in this case, whether or not the amendment aforesaid has been constitutionally agreed to and adopted, and this is the question discussed by counsel, and the only question we are called on to determine. The validity of the amendment, and whether the same now constitutes a part of the Constitution, depend upon the question whether the Eighteenth General Assembly agreed to the amendment which was ratified and adopted by the electors, and whether the amendment was agreed to by the Eighteenth General Assembly in the form and manner required by the Constitution.

When the Constitution was adopted it was wisely therein provided, or at least it must be so presumed, that "any amendment or amendments to this Constitution may be proposed in either House of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two Houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published as provided by law for three months previous to the time of making such choice; and if, in the General Assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each House, then it shall be the duty of the General Assembly to submit such proposed amendment to the people, in such manner and at such time as the General Assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the Constitution of this State." — Art. 10, § 1.

This is the only way the Constitution can be amended or changed except by a convention called for that purpose.

In compliance with the foregoing provision, there was introduced into the House of Representatives of the Eighteenth General Assembly a joint resolution. . . . Thereupon, such enrolled resolution was signed by the Speaker of the House and President of the Senate, and approved by the Governor. The joint resolution thus signed and approved was as follows: "No person shall manufacture for sale, or sell, or keep for sale, as a beverage, any intoxicating liquor whatever, including ale, wine, and beer." This proposed amendment to the Constitution was agreed to by the Nineteenth General Assembly, and ratified by the electors at a special election, held on the 27th day of June, 1882. Counsel for the plaintiff insist that the joint resolution, at the time it was agreed to by the Senate [of the Eighteenth General Assembly], contained the words "or to be used." Their contention is that it then reads as follows: "No person shall manufacture for sale, or sell, or keep for sale, as a beverage, or to be used, any intoxicating liquor whatever, including ale, wine, and beer." The resolution claimed to have been agreed to by the Senate is materially different in substance from the one ratified by the electors. Counsel for the appellant do not claim this is not so as shown by the journals, but their contention is that the enrolled resolution, signed by the Speaker of the House and President of the Senate, and approved by the Governor, is a verity, and is conclusive evidence that the resolution as enrolled was agreed to by both Houses of the Eighteenth General Assembly, or, if this is not so, that the preponderance of the evidence is in favor of the proposition that the resolution which was agreed to was correctly enrolled. The plaintiff contends that it is made clear and certain by an examination of the Senate journal that the words "or to be used" were in the resolution when it passed the Senate, and that the journal is the best evidence of such fact. . . .

[The Court (BECK, J. dissenting) held that it might examine the journals of the Eighteenth General Assembly; and, as a result of the examination, that the amendment agreed to by the Senate was different from that which was agreed to and submitted to the people by the Nineteenth General Assembly, and therefore, although ratified by the people, had not legally become a part of the Constitution.]

ON REHEARING. DAY, Ch. J. — A petition for rehearing was presented in this cause, and the whole case has been re-argued by eminent counsel with much ability and research. In view of the great interest which has attached to this question, and of its public importance, we deem it not only proper, but necessary, to examine with considerable fulness the leading points relied upon as necessitating a conclusion different from the one reached in the foregoing opinion.

I. It is asserted in the petition for rehearing that "the judicial department of the State has no jurisdiction over political questions, and cannot review the action of the Nineteenth General Assembly, and of the people, in the matter of the adoption or amendment of the Consti-

tution of the State." This position practically amounts to this: that the provisions of the Constitution for its own amendment are simply directory, and may be disregarded with impunity; for it is idle to say that these requirements of the Constitution must be observed, if the departments charged with their observance are the sole judges as to whether or not they have been complied with. This proposition was advanced for the first time upon the petition for rehearing, and, if correct, it is of course an end of the controversy. Upon this branch of the case counsel cite *Luther v. Borden*, 7 How. 1. As this case has principally been relied upon by the advocates of the theory now under consideration, and has been given great prominence in the discussions which have taken place, we desire to present its facts with a degree of fulness which, under ordinary circumstances, would perhaps be considered unnecessary, to the end that the degree of its applicability to the present case may be fully understood.

In 1841, the State of Rhode Island was acting under the form of government established by the charter of Charles II. in 1663. In this form of government no mode of proceeding was pointed out by which amendments could be made. It authorized the legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders. In 1841, meetings were held and associations were formed by those who were in favor of a more extended right of suffrage, which finally resulted in the election of a convention to form a new Constitution, to be submitted to the people for their adoption or rejection. The persons chosen came together and framed a Constitution by which the right of suffrage was extended to every male citizen of twenty-one years of age who had resided in the State for one year. Upon a return of the votes, the convention declared that the Constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and Constitution of Rhode Island. The charter government did not admit the validity of the proceedings, nor acquiesce in them. On the contrary, in January, 1842, when this new Constitution was communicated to the Governor and by him laid before the legislature, it passed resolutions declaring all acts done for the purpose of imposing that Constitution upon the State, to be an assumption of the powers of government, in violation of the rights of the existing government and of the people at large, and that it would maintain its authority and defend the legal and constitutional rights of the people. Thomas W. Dorr, who had been elected Governor under the new Constitution, prepared to assert the authority of that government by force, and many citizens assembled in arms to support him. The charter government thereupon passed an Act declaring the State under martial law, and at the same time proceeded to call out the militia to repel the threatened attack, and to subdue those who were engaged in it. The plaintiff, Luther, was engaged in supporting the new government, and, in order to arrest him, his house was broken and entered by the defendants, who were enrolled in the military force of the

old government, and in arms to support its authority. The government under the new Constitution had but a short and ignoble existence. In May, 1842, Dorr made an unsuccessful attempt, at the head of a military force, to get possession of the State arsenal at Providence, which was repulsed. In June following, an assemblage of some hundreds of armed men, under his command at Chepachet, dispersed, upon the approach of the troops of the old government, and no further effort was made to establish the new government. In January, 1842, the charter government took measures to call a convention to revise the existing form of government, and a new Constitution was formed, which was ratified by the people, and went into operation in May, 1843, at which time the old government formally surrendered all its powers. Under this government Dorr was tried for treason, and in June, 1844, was sentenced to imprisonment for life. In October, 1842, Luther brought an action in the Circuit Court of the United States, against Borden and others, to recover damages for the breaking and entering of his house in June, 1842. The defendants justified, alleging that there was an insurrection to overthrow the government, that martial law was declared, that plaintiff was aiding and abetting the insurrection, that defendants were enrolled in the militia force of the State and were ordered to arrest the plaintiff. The plaintiff relied upon the fact that the Dorr government, to which he adhered, was the legal government of the State, and, as the new Constitution had never been recognized by any department of the old government, he offered to prove at the trial, by the production of the original ballots, and the original registers of the persons voting, and by the testimony of the persons voting, and by the Constitution itself, and by the census of the United States for the year 1840, that the Dorr Constitution was ratified by a large majority of the male people of the State, of the age of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the State. The Circuit Court rejected the evidence, and instructed the jury that the charter government, and laws under which the defendants acted, were, at the time the trespass was alleged to have been committed, in full force and effect, and constituted a justification of the acts of the defendants. The correctness of this ruling involved the only question, which was taken to the Supreme Court of the United States for review. The Supreme Court held that the evidence was properly rejected. Of the correctness of that decision no one can entertain the shadow of a doubt. But the differences between that case and this are so many and so evident, as to deprive it of all force as an authority in the present controversy. In that case an entire change in the form of government was undertaken; in this, simply an amendment, in no manner affecting the judicial authority of those acting under the existing government, is sought to be incorporated into the existing Constitution. In that case the charter provided no means for its amendment; in this, the mode of an amendment is specifically provided. In that case the authority of the court was invoked

for the admission of oral evidence to overthrow the existing government and establish a new one in its place; in this, that authority is invoked simply to preserve the existing Constitution intact.

It is evident, from an examination of the entire case of *Luther v. Borden*, that the question which the court was considering pertained to the power of the Federal courts to determine between rival constitutions in the States. The power is not denied to the State courts, unless one of the constitutions involved in the controversy be the one under which the court is organized. This is fully apparent from the whole opinion. Referring to the trial of Thomas W. Dorr for treason, in the Supreme Court of Rhode Island, the court say: "It is worthy of remark, however, when we are referring to the authority of State decisions, that the trial of Thomas W. Dorr took place after the Constitution of 1843 went into operation. The judges who decided that case held their authority under that Constitution; and it is admitted on all hands that it was adopted by the people of the State, and is the lawful and established government. It is the decision, therefore, of a State court, whose judicial authority to decide upon the Constitution and laws of Rhode Island is not questioned by either party to this controversy, although the government under which it acted was framed and adopted under the sanction and laws of the charter government. The point, then, raised here has already been decided by the courts of Rhode Island. The question relates altogether to the Constitution and laws of that State; and the well-settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the Constitution and laws of the State. Upon what ground could the Circuit Court of the United States, which tried this case, have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island?" It seems from the foregoing quotation, which is really the fact, that the courts of Rhode Island had determined the question involved in *Luther v. Borden*, and that the courts of the United States were bound by and followed that adjudication.

The language of the court which, it is claimed, asserts the doctrine that the question of a change of constitutions is a political one, with which courts have nothing to do, was clearly employed with reference to the peculiar facts of the case. This is apparent from the following language of the opinion, which is found upon pages 39, 40. "Indeed, we do not see how the question could be tried and judicially decided in the State court. Judicial power presupposes an established government, capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived, and if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it, and if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the

government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and the authority of the government under which it is exercising judicial power." That this reasoning is eminently sound no one can doubt. A court which, under the circumstances named, should enter upon an inquiry as to the existence of the Constitution under which it was acting, would be like a man trying to prove his personal existence, and would be obliged to assume the very point in dispute, before taking the first step in the argument. It is apparent that the reasoning employed in that case can have no application whatever to an amendment to a constitution, which does not affect the form of government, or the judicial powers of existing courts. The case of *Luther v. Borden* gives no countenance whatever to the doctrine that the sovereignty of the people extends rightfully to the overturning of constitutions and the adoption of new ones, without regard to the forms of existing provisions. It is true that right, under our form of government, exists, but it is a revolutionary and not a constitutional right. When that right is invoked, a question arises which is above the Constitution, and above the courts, and which contending factions can alone determine by appeal to the *dernier resort*. In such a case as that, might makes right. That there are questions of such a character as to admit of no adjustment but through an appeal to arms, we freely admit. This arises out of the imperfections of human government. A government which could provide for the peaceful adjustment of all questions would be more than human. But surely no sagacious statesman or wise jurist will seek, by a narrow construction of judicial power, to extend the questions which are beyond the domain of the courts, and capable of solution only by an appeal to arms. Happily for the permanency and security of our institutions, the present case, as we believe, involves no such question.

It has been said that changes in the Constitution may be introduced in disregard of its provisions: that, if the majority of the people desire a change, the majority must be respected, no matter how the change may be effected, and that the change, if revolution, is peaceful revolution. But the revolution is peaceful only upon the assumption that the party opposed surrenders its opposition and voluntarily acquiesces. If it objects to the change, then a question arises which can be determined only in one of two methods, by the arbitrament of the courts, or by the arbitrament of the sword. . . . The contest between the rival governments in the State of Rhode Island raised a question which was above the power of the existing courts: and it is a matter of history that it was not determined until the adherents of the Dorr Constitution fled at the point of the bayonet. We have read history to little purpose, if we refuse to learn from its examples or profit by its teachings. The public dangers which threatened the republic from the rival claims

for the Presidency, so graphically and so beautifully described by appellant's attorney, were averted only through a commission created by Congress, intrusted with judicial powers, which judicially determined the questions involved, and to whose decisions the people yielded voluntary obedience. That judicial decision averted the horrors of a civil war. The political department of the government, to which so much reference has been made in this case, stood appalled and impotent in the face of the great danger, and yet we are asked to abdicate our functions, to deny our jurisdiction, and to leave the question of an amendment to the Constitution, unless voluntarily acquiesced in, to be determined by a resort to arms. We ought to ponder long before we adopt a doctrine so fraught with danger to republican institutions. All the danger lies in the line of the argument of appellant's attorneys. The courts can never overturn our institutions or subvert our liberties. They command neither the purse nor the sword of the State. But a people which is educated to disrespect the decisions and disregard the adjudications of the courts, is prepared for anarchy, with all its attendant evils and dreadful consequences. We may, perhaps, be excused, if in the interest of social order and public security, and the permanency of republican institutions, we enter a most earnest protest against the heresies which have been advanced in this case.

The appellant further cites and relies upon *Williams v. Suffolk Insurance Company*, 13 Pet. 414. The only point determined in this is, that where the President, in a message to Congress, and in correspondence carried on with the government of Buenos Ayres, denied the jurisdiction of that country over the Falkland Islands, the courts must take the facts to be so.

The determining of the territorial jurisdiction of a foreign country, from the very nature of the subject, cannot reside in the courts of this country, but must be intrusted to the treaty-making power, which rests in the President by and with the advice and consent of the Senate. When, therefore, the President, in his official communications, has denied the jurisdiction of a foreign country over specified territory, it may well be conceded that it would not be within the jurisdiction of the courts to determine the fact to be otherwise. We are, however, unable to see that this case has any bearing upon the question now under consideration.

The case of *United States v. Baker et al.*, 5 Blatchford, 12, is also cited and relied upon by appellant. This is a *nisi prius* case. The defendants were indicted for piracy, and were tried in 1861. They were acting as privateers, under a commission from Jefferson Davis, President of the Confederate States, which they claimed was, at least, a government *de facto*, and entitled to the rights and privileges that belong to a sovereign and independent nation. Nelson, J., upon this branch of the case, charged the jury as follows: "The court do not deem it pertinent or material to enter into this wide field of inquiry.



This branch of the defence involves considerations that do not belong to the courts of the country. It involves the determination of great public and political questions, which belong to the departments of our government that have charge of our foreign relations—the legislative and executive departments. When those questions are decided by those departments, the courts follow the decisions, and, until those departments have recognized the existence of the new government, the courts of the nation cannot. Until this recognition of the new government, the courts are obliged to regard the ancient state of things as remaining unchanged.” This case falls under the same principle as the preceding case.

The case of *White v. Hart*, 13 Wallace, 646, which is the only remaining case cited by the appellant upon this branch of the case, originated as follows: In January, 1866, the plaintiff instituted a suit in the Supreme Court of Chattooga County, Georgia, upon a promissory note. The defendant pleaded in abatement that the consideration of the note was a slave, and that, by the present Constitution of the State of Georgia, the court is prohibited to take and exercise jurisdiction or render judgment thereon. To this plea the plaintiff demurred. The court overruled the demurrer, and gave judgment for the defendants, thus enforcing the constitutional provision. The plaintiff excepted, and removed the case to the Supreme Court of the State, where the judgment was affirmed, and the plaintiff thereupon prosecuted a writ of error in the Supreme Court of the United States. The Constitution of Georgia of 1868 contains the following clause:

“ Provided, that no court or officer shall have, nor shall the General Assembly give, jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave or the hire thereof.” The plaintiff insisted that this provision was in conflict with the Constitution of the United States, in that it impaired the obligation of contracts. The defendant sought to maintain the judgment in his favor, upon the ground, amongst others, that the Constitution of Georgia was adopted under the dictation and coercion of Congress, and is the Act of Congress rather than of the State, and that, though a State cannot pass a law impairing the validity of contracts, Congress can, and that for this reason the inhibition in the Constitution of the United States has no effect in this case. In passing upon this question the court says: “ Congress authorized the State to frame a new constitution, and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received, and so recognized in the subsequent action of that body. The State is estopped to assail it upon such an assumption. Upon the same ground she might deny the validity of her ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it.”

This case is a very peculiar one, from the fact that the defendant did not claim that the Constitution was not in force on account of its being adopted under coercion, but he claimed the benefit of its provisions *because* it was adopted under coercion. We most heartily approve the decision of the court in this case. The court might even have gone further, if the question had been in the case, and decided that, if a question had been raised in the courts of Georgia as to the validity of the Constitution, on the ground that its adoption had been coerced by Congress, the courts of that State could not entertain jurisdiction of the question. But even such a decision as that would not have been at all in conflict with our right to entertain jurisdiction in this case. These are all the authorities relied upon by appellant upon this branch of the case. We think it is apparent that they do not, even by implication, sustain the doctrine contended for, that the judicial department of the State cannot review the action of the General Assembly in the matter of the amendment of the Constitution of the State. Counsel have drawn an appalling picture of the wreck in which our political institutions would be involved, if the courts should conclude to decide that the Constitution of 1857, under which they are organized, had not been properly adopted. The courts of this State possess no such power, and they could not assume such a jurisdiction. The reason why a court could not enter upon the determination as to the validity of a constitution under which it is itself organized, is forcibly set forth in the case of *Luther v. Borden, supra*, upon which appellant relies. The distinction between such a case and one involving merely an amendment, not in any manner pertaining to the judicial authority, must at once be apparent to the legal mind. The authorities recognize the distinction. We are at a loss to know why appellant's counsel ignore and disregard it.

Appellant's counsel cite and rely upon section 2, Article 1, of the Constitution of the State. This section is a portion of the Bill of Rights, and is as follows: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require." Abstractly considered, there can be no doubt of the correctness of the propositions embraced in this section. These principles are older than constitutions, and older than governments. The people did not derive the rights referred to from the Constitution, and, in their nature, they are such that the people cannot surrender them. The people would have retained them if they had not been specifically recognized in the Constitution. But let us consider how these rights are to be recognized in an organized government. The people of this State have adopted a constitution which specifically designates the modes for its own amendment. But this section declares the people to have the right at all times to alter or reform the government, whenever the public good may require it. If the people unanimously agree respecting an alteration in

the government, there could be no trouble, for there would be no one to object. Suppose, however, a part of the people conclude that the public good requires an alteration or reformation in the government, and they set about the adoption of a new constitution, in a manner not authorized in the old one. Suppose, also, as would most likely prove to be the case, that a part of the people are content with the existing government, and will not consent to the change, and that the Governor, who, under the Constitution, is the "Commander-in-chief of the militia, the army and navy of the State," determines to maintain the existing government by force. It is evident that the *people* who think the public good requires a change, can establish these changes only by superior force. If they are powerful enough to succeed, well. They will have altered or reformed the government. But if they are not powerful enough to succeed, their attempt to overthrow the government is treason, and they are liable to punishment as traitors. They have the right to alter their government, in a manner not recognized in the Constitution, only when they can maintain that right by superior force. It follows, then, after all, that the much boasted right claimed under this action, is simply the right to alter the government in the manner prescribed in the existing Constitution, or the right of revolution, which is a right to be exercised, not under the Constitution, but in disregard and independently of it.

For a very valuable case upon this subject, see *Wells v. Bain*, 75 Pa. St. 39. . . . That eminent jurist and law-writer, Justice Cooley, in his work upon Constitutional Limitations, p. 598, says: "Although by their constitutions the people have delegated the exercise of sovereign powers to the several departments, they have not thereby divested themselves of the sovereignty. The government which they create they retain in their own hands a power to control, so far as they have thought needful, and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people can only be of legal force when expressed in the times and under the conditions which they themselves have prescribed and pointed out by the Constitution; and if any attempt should be made by any portion of the people, however large, to interfere with the regular workings of the agencies of government, at any other time, or in any other mode, than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who for the time being represent legitimate government." The author cites *Gibson v. Mason*, 5 Nevada, 291, in which Chief Justice Lewis employs the following language: "The maxim which lies at the foundation of our government is that all political power originates with the people. But since the organization of government, it cannot be claimed that either the legislative, executive, or judicial powers, either wholly or in part, can be exercised by them. By the institution of government the people

surrender the exercise of all these sovereign functions of government to agents chosen by themselves, who, at least theoretically, represent the supreme will of their constituents."

On page 30, Judge Cooley further says: "In the original States, and all others subsequently admitted to the Union, the power to amend or revise their constitutions resides in the great body of the people as an organized body politic, who, being vested with ultimate sovereignty, and the source of all State authority, have power to control and alter the law which they have made at their will. But the people in the legal sense must be understood to be those who, by the existing Constitution, are clothed with political rights, and who, while that instrument remains, will be the sole organs through which the will of the body politic can be expressed. But the will of the people to this end can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the Constitution whose revision or amendment is sought, or by an Act of the legislative department of the State, which alone would be authorized to speak for the people upon this subject, and to point out a mode for the expression of their will, in the absence of any provision for amendment or revision contained in the Constitution itself." . . . In *Collier v. Frierson*, 24 Ala. 108, it appears that the legislature had proposed eight different amendments to be submitted to the people at the same time. The people had approved them, and all the requisite proceedings to make them a part of the Constitution had been had, except that in the subsequent legislature the resolution for their ratification had by mistake omitted to recite one of them. On the question whether this one had been adopted, the court say: "The Constitution can be amended in but two ways; either by the people who originally framed it, or in the mode prescribed in the instrument itself. If the last mode is pursued, the amendments must be proposed by two thirds of each House of the General Assembly; they must be published in print at least three months before the next general election for representatives; it must appear from the returns made to the Secretary of State that a majority of those voting for representatives have voted in favor of the proposed amendments, and they must be ratified by two thirds of each House of the next General Assembly, after such election, voting by yeas and nays, the proposed amendments having been read at each session three times on three several days in each House. We entertain no doubt that to change the Constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The Constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisites are to be observed, before a change can be effected. But to what purpose are those acts required or those requisitions enjoined, if the legislature, or any department of

the government, can dispense with them? To do so would be to violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy requires the court to pronounce against any amendment which is not shown to have been made in accordance with the rules prescribed by the fundamental law." In this case counsel distinctly made the point that, "when the legislature has declared an act done, which it alone has the power to do, it does not become the judiciary to gainsay it." The court repudiated this doctrine and asserted its jurisdiction in the following terse and unambiguous language: "Every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law."

The case of *State v. McBride*, 4 Mo. 303, involved a question as to the proper adoption of an amendment to the Constitution of the State of Missouri. The counsel on behalf of the State contended almost in the language of appellant's counsel in this case, "that this amendment having been passed and promulgated by the Eighth General Assembly, as a part of the Constitution, this court is bound to receive and give it the effect of a constitutional provision; it being an act done by the General Assembly, not in their capacity of ordinary legislation, but the exercise of sovereign authority in a conventional capacity." The language of the court in passing upon this position of counsel is so applicable to, and so entirely decisive of, the question now under consideration, that we quote in full. The court says: "The Constitution of this State requires that each officer, whether civil or military, shall, before entering on the duties of his office, take an oath or affirmation to support the Constitution of the United States and of this State, and to demean himself faithfully in office. In pursuance of the duty imposed by this oath, it has become quite a common business of the courts to examine the Acts of the legislative body, to see whether any of them infringe the Constitution, and to declare that such Acts, or parts of Acts, as are repugnant to the Constitution, are not the law of the land, and are, therefore, of no force. No educated man at this day denies this right to the courts. On the contrary it is considered a base abandonment of duty for a judge to hesitate, when it becomes his duty to examine the acts of the more powerful branches of the government. If, then, the Constitution be the supreme law of the land, it becomes the duty of the judge to look into and understand well this first law of the land. The General Assembly, acting itself under a power granted by the convention, can only change the Constitution in the manner presented to it. Is, then, this court, each member of which is sworn to support the Constitution, that first law of the land, to be told that they are not to inquire what that Constitution is? We are told that this is a matter which the people have confided to two successive General Assemblies, and that their declaration of what is done is to be to us evidence that the thing is done, they being sworn, as well

as ourselves, to support the Constitution. Yet we look into the Acts of each General Assembly, and if we find any of its Acts violating the Constitution, we declare such Act null and void. The General Assembly, or two General Assemblies in succession, are but public servants, and it is disrespectful to them to say that their acts will not bear inspection. If, then, they will bear inspection, and if, as we believe, they have left behind them evidence of what they have done, why need we, whose duty it is to observe the Constitution as the supreme law of the land, hesitate respectfully to approach and examine those proofs, and see if indeed the Constitution of 1820 has been changed, or if by neglecting to pursue the course pointed out by the 12th section of the Constitution, they have failed to give to their acts the validity of constitutional acts. To tell us that the people have reserved to themselves the sole right of looking into the matter, is to tell us that we are sworn to support a constitution which we are not permitted to know." Those two cases contain the calm adjudications of respectable courts, in times when there was no popular excitement, and upon constitutional amendments not arousing popular interest. They are, therefore, entitled to the highest consideration, as they were entirely uninfluenced by popular clamor.

It is not all material that in *State v. McBride, supra*, the court finally concluded that the amendment under consideration had been properly adopted. The court had to determine its power to decide, before it could decide in favor of the amendment. As was well said by one of appellant's attorneys upon the argument: "The power to decide, involves the power to decide either way." In the *State v. Swift*, 69 Ind. 505, the jurisdiction of the court was exercised, and an amendment to the Constitution of the State of Indiana was held not to have been properly adopted. In the opinion the court says: "The people of a State may form an original constitution, or abrogate an old one or form a new one, at any time, without any political restriction except the Constitution of the United States; but if they undertake to add an amendment, by the authority of legislation, to a constitution already in existence, they can do it only by the method pointed out by the constitution to which the amendment is to be added. The power to amend a constitution by legislative action does not confer the power to break it, any more than it confers the power to legislate on any other subject contrary to its prohibitions."

In *Westinghausen v. The People*, 44 Mich. 265, the Supreme Court of Michigan entertained jurisdiction of a question as to the adoption of an amendment to the Constitution of that State. The *Prohibitory Amendment Cases*, 24 Kans. 700, in so far as they assume jurisdiction over the question involved, are in harmony with all the cases upon the subject. In *State v. Timme*, 11 N. W. Rep. 785, the Supreme Court of Wisconsin assumed jurisdiction of a question involving the validity of an amendment to the Constitution of that State. The same thing was done in *Trustees University of North Carolina v. McIver*, 72 N. C. 76.

It is true that in the last five cases the question of jurisdiction was not raised by counsel. But the courts could not have entered upon an examination of the cases without first determining in favor of their jurisdiction. If they entertained doubts respecting their jurisdiction, it was the duty of the courts to raise the question themselves. We have then seven States, Alabama, Missouri, Kansas, Michigan, North Carolina, Wisconsin, and Indiana, in which the jurisdiction of the courts over the adoption of an amendment to a constitution has been recognized and asserted. In no decision, either State or Federal, has this jurisdiction been denied. We may securely rest our jurisdiction upon the authority of these cases. He would be a bold jurist, indeed, who would ride rough-shod over such an unbroken current of judicial authority, so fortified in principle, sustained by reason, and so necessary to the peaceful administration of the government. . . . Abidingly and firmly convinced of the correctness of our former conclusion, recognizing no superior higher than the Constitution, acknowledging no fealty greater than loyalty to its principles, and fearing no consequences except those which would flow from a dereliction in duty, we adhere to and reaffirm the doctrines already announced.

The petition for rehearing is overruled. . . .

[The dissenting opinion of BECK, J., is omitted.]<sup>1</sup>

<sup>1</sup> Compare Const. Prohib. Amend. 24 Kans. 700; Jameson, Const. Conv. (4th ed.), §§ 561, 574 *e*, 574 *f*; and ch. viii. *passim*. As regards the proper evidence of the *factum* of a statute, the right to consult the legislative journals, and the finally authentic quality of the enrolment, see Y. B. H. VI., 17, 8 (1455); *King v. Countess Dowager of Arundel*, Hob. 110 (1616), and the carefully considered case of *Field v. Clark*, 143 U. S. 649, with a note, *Ib.* 661, referring to the cases in the several States. — ED.

## CHAPTER III.

## THE JURISDICTION OF THE UNITED STATES.

IN *Livingston and Fulton v. Van Ingen, et al.* 9 Johns. 507, (1812), it was held that statutes of New York granting to the plaintiffs the exclusive right of navigating the waters of that State in vessels propelled by steam, were not in violation of the Constitution of the United States;<sup>1</sup> and the same doctrine was afterwards held in *Gibbons v. Ogden*, 17 Johns. 488 (1820). This doctrine was overruled by the Supreme Court of the United States, on error, in *Gibbons v. Ogden*, 9 Wheat. 1 (1824), so far as concerned vessels licensed under the statutes of the United States for regulating the coasting trade, and navigating between New York and other States; and in *North River Steamb. Co. v. Livingston*, 3 Cow. 713 (1825), as regards vessels similarly licensed and navigating merely the waters of New York.

In *Livingston v. Van Ingen, ubi supra*, p. 573, KENT, C. J., said: "The legislative power, in a single, independent government, extends to every proper object of power, and is limited only by its own constitutional provisions, or by the fundamental principles of all government, and the unalienable rights of mankind. In the present case, the grant to the appellants took away no vested right. It interfered with no man's property. It left every citizen to enjoy all the rights of navigation, and all the use of the waters of this State which he before enjoyed. There was, then, no injustice, no violation of first principles, in a grant to the appellants, for a limited time, of the exclusive benefit of their own hazardous and expensive experiments. The first impression upon every unprejudiced mind would be, that there was justice and policy in the grant. Clearly, then, it is valid, unless the power to make it be taken away by the Constitution of the United States.

"We are not called upon to say affirmatively what powers have been granted to the general government, or to what extent. Those powers, whether express or implied, may be plenary and sovereign, in reference to the specified objects of them. They may even be liberally construed in furtherance of the great and essential ends of the government. To this doctrine I willingly accede. But the question here is, not what powers are granted to that government, but what powers are retained by this, and, particularly, whether the States have absolutely parted with their original power of granting such an exclusive privilege as the one now before us. It does not follow, that because a given

<sup>1</sup> In 1811, it had been held in the same case that the Circuit Court of the United States (1 Paine, 45) had no jurisdiction.—Ed.



power is granted to Congress, the States cannot exercise a similar power. We ought to bear in mind certain great rules or principles of construction peculiar to the case of a confederated government, and by attending to them in the examination of the subject, all our seeming difficulties will vanish.

“When the people create a single, entire government, they grant at once all the rights of sovereignty. The powers granted are indefinite, and incapable of enumeration. Everything is granted that is not expressly reserved in the constitutional charter, or necessarily retained as inherent in the people. But when a Federal government is erected with only a portion of the sovereign power, the rule of construction is directly the reverse, and every power is reserved to the member that is not, either in express terms, or by necessary implication, taken away from them, and vested exclusively in the Federal head. This rule has not only been acknowledged by the most intelligent friends to the Constitution, but is plainly declared by the instrument itself. Congress have power to lay and collect taxes, duties, and excises, but as these powers are not given exclusively, the States have a concurrent jurisdiction, and retain the same absolute powers of taxation which they possessed before the adoption of the Constitution, except the power of laying an impost, which is expressly taken away. This very exception proves that, without it, the States would have retained the power of laying an impost; and it further implies, that in cases not excepted, the authority of the States remains unimpaired.

“This principle might be illustrated by other instances of grants of power to Congress with a prohibition to the States from exercising the like powers; but it becomes unnecessary to enlarge upon so plain a proposition, as it is removed beyond all doubt by the tenth article of the amendments to the Constitution. That article declares that ‘the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’ The ratification of the Constitution by the convention of this State, was made with the explanation and understanding, that ‘every power, jurisdiction, and right, which was not clearly delegated to the general government, remained to the people of the several States, or to their respective State governments.’ There was a similar provision in the Articles of Confederation,<sup>1</sup> and the principle results from the very nature of the Federal Government, which consists only of a defined portion of the undefined mass of sovereign power originally vested in the several members of the Union. There may be inconveniences, but generally there will be no serious difficulty, and there cannot well be any interruption of the public peace, in the concurrent exercise of those powers. The powers of the two governments are each supreme within their respective constitutional spheres. They

<sup>1</sup> The Articles (Art. II.) read: “Each State retains . . . every power . . . which is not by this confederation expressly delegated.” . . . The Tenth Amendment omits the word “expressly.” — Ed.

may each operate with full effect upon different subjects, or they may, as in the case of taxation, operate upon different parts of the same object. The powers of the two governments cannot indeed be supreme over each other, for that would involve a contradiction. When those powers, therefore, come directly in contact, as when they are aimed at each other, or at one indivisible object, the power of the State is subordinate, and must yield. The legitimate exercise of the constitutional powers of the general government becomes the supreme law of the land, and the national judiciary is specially charged with the maintenance of that law, and this is the true and efficient power to preserve order, dependence, and harmony in our complicated system of government. We have, then, nothing to do in the ordinary course of legislation, with the possible contingency of a collision, nor are we to embarrass ourselves in the anticipation of theoretical difficulties, than which nothing could, in general, be more fallacious. Such a doctrine would be constantly taxing our sagacity, to see whether the law might not contravene some future regulation of commerce, or some moneyed or some military operation of the United States. Our most simple municipal provisions would be enacted with diffidence, for fear we might involve ourselves, our citizens and our consciences, in some case of usurpation. Fortunately for the peace and happiness of this country, we have a plainer path to follow. We do not handle a work of such hazardous consequence. We are not always walking *per ignes supposito cineri doloso*. Our safe rule of construction and of action is this, that if any given power was originally vested in this State, if it has not been exclusively ceded to Congress, or if the exercise of it has not been prohibited to the States, we may then go on in the exercise of the power until it comes practically in collision with the actual exercise of some congressional power. When that happens to be the case, the State authority will so far be controlled, but it will still be good in all those respects in which it does not absolutely contravene the provision of the paramount law.”<sup>1</sup>

PREVIOUS to the formation of the new Constitution, we were divided into independent States, united for some purposes, but, in most respects, sovereign. These States could exercise almost every legislative power, and, among others, that of passing bankrupt laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to Con-

<sup>1</sup> See 1 Kent Com. (12th ed.) 391, 432, *et seq.* — Ed.

gress did not imply a prohibition on the States to exercise the same power. But it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress the subject is as completely taken from the State legislatures, as if they had been expressly forbidden to act on it.

Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States, of this description? . . . MARSHALL, C. J. (for the court), in *Sturges v. Crowninshield*, 4 Wheat. 192-193 (1819).

As preliminary to the very able discussions of the Constitution which we have heard from the Bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the Bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, im-

port, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred. . . .

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments. . . . MARSHALL, C. J. (for the court), in *Gibbons v. Ogden*, 9 Wheat. 187-189 (1824).<sup>1</sup>

<sup>1</sup> In 1789, the Constitution of the United States, having been adopted by the required number of States . . . went into operation, and became the law of the land. This system was founded upon an entirely different principle from that of the confederation. Instead of a league among sovereign States, it was a government formed by the people, and to the extent of the enumerated subjects, the jurisdiction of which was confided to and vested in the general government, acting directly upon the people. "We the people," are the authors and constituents; and "in order to form a more perfect union" was the declared purpose of the constitution of a general government.

It was a bold, wise, and successful attempt to place the people under two distinct

## M'CULLOCH v. THE STATE OF MARYLAND ET AL.

SUPREME COURT OF THE UNITED STATES. 1819.

[4 *Wheat.* 316; 4 *Curtis's Decisions*, 415.]<sup>1</sup>

ERROR to the Court of Appeals of the State of Maryland.

This was an action of debt, brought by the defendant in error, John James, who sued as well for himself as for the State of Maryland, in the County Court of Baltimore County, in the said State, against the plaintiff in error, M'Culloch, to recover certain penalties under the Act of the Legislature of Maryland, hereafter mentioned. Judgment being rendered against the plaintiff in error, upon the following statement of facts, agreed and submitted to the court by the parties, was affirmed by the Court of Appeals of the State of Maryland, the highest court of law of said State, and the cause was brought, by writ of error, to this court.

In April, 1816, the Bank of the United States was incorporated by an Act of Congress, and in 1817 a branch of this bank was established

governments, each sovereign and independent within its own sphere of action, and dividing the jurisdiction between them, not by territorial limits, and not by the relation of superior and subordinate, but classifying the subjects of government and designating those over which each has entire and independent jurisdiction. This object the Constitution of the United States proposed to accomplish by a specific enumeration of those subjects of general concern, in which all have a general interest, and to the defence and protection of which the undivided force of all the States could be brought promptly and directly to bear.

Some of these were our relations with foreign powers — war and peace, treaties, foreign commerce and commerce amongst the several States, with others specifically enumerated; leaving to the several States their full jurisdiction over rights of person and property, and, in fact, over all other subjects of legislation, not thus vested in the general government. All powers of government, therefore, legislative, executive and judicial, necessary to the full and entire administration of government over these enumerated subjects, and all powers necessarily incident thereto, are vested in the general government; and all other powers, expressly as well as by implication, are reserved to the States.

This brief and comprehensive view of the nature and character of the government of the United States, we think, is not inappropriate to this discussion, because it follows as a necessary consequence that, so far as the government of the United States has jurisdiction over any subject, and acts thereon within the scope of its authority, it must necessarily be paramount, and must render nugatory all legislation by any State, which is repugnant to and inconsistent with it. There may perhaps in some few cases be a concurrent jurisdiction, as in case of direct taxation of the same person and property; but until it shall practically extend to a case where there may be an actual interference, by seizing the same property at the same time, the exercise of the powers by the one is not, in its necessary effect, exclusive of the exercise of a like power by the other; but in such case they are not repugnant. That one must be so paramount, to prevent constant collision, is obvious; and, accordingly, the Constitution expressly provides that the Constitution and all laws and treaties, made in pursuance of its authority, shall be the supreme law of the land. — *Opinion of the Justices*, 14 Gray, 615-617. Compare WAITE, C. J. (for the court), in *U. S. v. Cruikshank et al.*, 92 U. S. 549-551.

<sup>1</sup> The statement of facts is shortened. — Ed.

at Baltimore in Maryland. In 1818, the Legislature of Maryland passed an Act to tax "all banks or branches thereof in the State of Maryland, not chartered by the legislature," by requiring that notes issued by them should be upon stamped paper. M'Culloch, the cashier, had violated this Act, by issuing notes upon unstamped paper. The facts were agreed.

The question submitted to the court for their decision in this case, is as to the validity of the said Act of the General Assembly of Maryland, on the ground of its being repugnant to the Constitution of the United States, and the Act of Congress aforesaid, or to one of them. Upon the foregoing statement of facts, and the pleadings in this cause (all errors in which are hereby agreed to be mutually released), if the court should be of opinion that the plaintiffs are entitled to recover, then judgment, it is agreed, shall be entered for the plaintiffs, for twenty-five hundred dollars, and costs of suit. But if the court should be of opinion that the plaintiffs are not entitled to recover upon the statement and pleadings aforesaid, then judgment of *non pros* shall be entered, with costs, to the defendant.

It is agreed that either party may appeal from the decision of the County Court to the Court of Appeals, and from the decision of the Court of Appeals to the Supreme Court of the United States, according to the modes and usages of law, and have the same benefit of this statement of facts, in the same manner as could be had if a jury had been sworn and impanelled in this cause, and a special verdict had been found, or these facts had appeared and been stated in an exception taken to the opinion of the court, and the court's direction to the jury thereon. . . .

*Webster and Pinkney*, for the plaintiff in error.

*Hopkinson, Jones, and Martin*, for the defendant.

The *Attorney-General* was also heard for the plaintiff, by reason of the interest of the United States.

MARSHALL, C. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an Act which has been passed by the legislature of that State. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative Acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original Act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert, that a measure adopted under these circumstances, was a bold and plain usurpation, to which the Constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the Constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the State legis-

latures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the Confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers



are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any State, to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to

avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of

those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some State constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the Constitution, and on the States the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the

process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each House may determine the rule of its proceedings; and it is declared that every bill which shall have passed both Houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say, that a legislature should exercise legisla-

tive powers, in the shape of legislation? After allowing each House to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense — in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the Bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution"

the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary" by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in Congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted — that of fidelity to the Constitution — is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend, that the legislature might not superadd to the oath directed by the Constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility,

because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the Constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the pow-

ers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:—

1. The clause is placed among the powers of Congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed



to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bawble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government, from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the Constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in

the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After this declaration, it can scarcely be necessary to say, that the existence of State banks can have no possible influence on the question. No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to State banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the Act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It

would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches, and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the Constitution, tax that branch? . . .

We are unanimously of opinion, that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. . . .

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### COHENS v. THE STATE OF VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1821.

[6 *Wheat.* 264; 5 *Curtis's Decisions*, 82.]

*Barbour and Smyth*, for defendant in error; *D. B. Ogden and Pinkney*, *contra*.

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of Hustings, for the borough of Norfolk, on an information for selling lottery tickets, contrary to an Act of the Legislature of Virginia. In the State court, the defendant claimed the protection of an Act of Congress. A case was agreed between the parties, which states the Act of Assembly on which the prosecution was founded, and the Act of Congress on which the defendant relied, and concludes in these words: "If upon this case the court shall be of opinion that the Acts of Congress before mentioned were valid, and, on the true construction of those Acts, the lottery tickets sold by the defendants as aforesaid, might lawfully be sold within the State of Virginia, notwithstanding the Act or statute of the General Assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. And if the court should be of opinion that the statute or Act of the General Assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said Acts of Congress, then judgment to be entered that the defendants are guilty, and that the Commonwealth recover against them one hundred dollars and costs."

Judgment was rendered against the defendants; and the court in which it was rendered being the highest court of the State in which the cause was cognizable, the record has been brought into this court by writ of error.

The defendant in error moves to dismiss this writ, for want of jurisdiction.

In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are:—

1. That a State is a defendant.
2. That no writ of error lies from this court to a State court.
3. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said that jurisdiction was not given by the Judiciary Act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the State court, because neither the Constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the first two points made at the Bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every State in the Union. That the Constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the Constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department.

1. The first question to be considered is, whether the jurisdiction of

this court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?

The second section of the third article of the Constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more States, between a State and citizens of another State," "and between a State and foreign States, citizens, or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

The counsel for the defendant in error have stated that the cases which arise under the Constitution must grow out of those provisions which are capable of self-execution; examples of which are to be found in the second section of the fourth article, and in the tenth section of the first article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some Act which becomes necessary to execute the powers given in the Constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the Constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case arising under the Constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the Constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the Constitution, in the twenty-fifth section of the Judiciary Act; and we perceive no reason to depart from that construction.

The jurisdiction of the court, then, being extended by the letter of the Constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of

this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent State is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides.

The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective States, adopted the present Constitution.

If it could be doubted whether, from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the Constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases, of every description, arising under the Constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our Constitution, the subordination of the State governments to that Constitution; the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States, is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case arising under the Constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case. . . .

We think, then, that as the Constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the Constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party.

This leads to a consideration of the Eleventh Amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or be-

tween a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the Constitution and laws from active violation. . . . Where, then, a State obtains a judgment against an individual, and the court rendering such judgment overrules a defence set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court for the sole purpose of inquiring whether the judgment violates the Constitution of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. . . . He only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the Constitution and laws of the Union. . . . The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court. . . . It has never been suggested that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate court. . . .

2. The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a State court.



This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The argument considers the Federal judiciary as completely foreign to that of a State; and as being no more connected with it, in any respect whatever, than the court of a foreign State. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the Constitution, the argument fails with it.

This hypothesis is not founded on any words in the Constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of State courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests, in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire, — for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the Constitution or law of a State, if it be repugnant to the Constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the Constitution?

We think it is not. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment.

The exercise of the appellate power over those judgments of the State tribunals which may contravene the Constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of intrusting the construction of the Constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the Federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the State tribunals. If the Federal and State courts have concurrent jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States; and if a case of this description brought in a State court cannot be removed before judgment, nor revised after judgment, then the construction of the Constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the State courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its courts, the necessity of uniformity, as well as correctness in expounding the Constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and State governments, from construing the words of the Constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. . . . *Motion denied.*

The cause was thereupon argued on the merits. *D. B. Ogden*, for the plaintiffs in error. *Webster, contra.* The Attorney-General, for the plaintiffs in error, in reply. [The judgment below was affirmed.]

HANS v. LOUISIANA.

SUPREME COURT OF THE UNITED STATES. 1889.

[134 U. S. 1.]

THIS was an action brought in the Circuit Court of the United States, in December, 1884, against the State of Louisiana by Hans, a citizen of that State, to recover the amount of certain coupons annexed to bonds of the State, issued under the provisions of an Act of the Legislature approved January 24, 1874. . . .

A citation being issued, directed to the State, and served upon the Governor thereof, the Attorney-General of the State filed an exception, of which the following is a copy, to wit:

"Now comes defendant, by the Attorney-General, and excepts to plaintiff's suit on the ground that this court is without jurisdiction *ratione personarum*. Plaintiff cannot sue the State without its permission; the Constitution and laws do not give this honorable court jurisdiction of a suit against the State, and its jurisdiction is respectfully declined.

"Wherefore, respondent prays to be hence dismissed, with costs and for general relief."

By the judgment of the court this exception was sustained, and the suit was dismissed. See *Hans v. Louisiana*, 24 Fed. Rep. 55. To this judgment the present writ of error was brought.

*Mr. J. D. Rouse* (*Mr. William Grant* was also on the brief) for plaintiff in error.

*Mr. Walter H. Rogers*, Attorney-General of the State of Louisiana, *Mr. M. J. Cunningham*, *Mr. B. J. Sage*, and *Mr. Alexander Porter Morse*, for defendant in error, submitted on their briefs.

MR. JUSTICE BRADLEY, after stating the case as above, delivered the opinion of the court.

The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

The ground taken is, that under the Constitution, as well as under the Act of Congress passed to carry it into effect, a case is within the jurisdiction of the Federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitution, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the Act conferring jurisdiction upon

the Circuit Court, which, as found in the Act of March 3, 1875, 18 Stat. 470, c. 137, § 1, is as follows, to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws, or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a State and its own citizens is not embraced within it; but it is contended that though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a Federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.

That a State cannot be sued by a citizen of another State, or of a foreign State, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana v. Jumel*, 107 U. S. 711; *Hagood v. Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against State officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the Federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign State; and may be thus sued in the Federal courts, although not allowing itself to be sued in its

own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the Judiciary Act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of *Chisholm v. Georgia*, 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the amendment, for, after its adoption, Attorney-General Lee, in the case of *Hollingsworth v. Virginia*, 3 Dall. 378, submitted this question to the court, "whether the amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?" *Tilghman* and *Rawle* argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the amendment. But, on the succeeding day, the court delivered a unanimous opinion, "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign State."

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm v. Georgia*; and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign States, citizens, or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign State, to sue another State of the Union in the

Federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only, by proper legislation, to invest the Federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

Looking back from our present standpoint at the decision in *Chisholm v. Georgia*, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the Federal judiciary to entertain suits by individuals against the States had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people. As some of their utterances are directly pertinent to the question now under consideration, we deem it proper to quote them.

The eighty-first number of the *Federalist*, written by Hamilton, has the following profound remarks :

"It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the Federal courts for the amount of those securities ; a suggestion which the following considerations prove to be without foundation :

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind ; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State ; and to ascribe to the Federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

The obnoxious clause to which Hamilton's argument was directed,

and which was the ground of the objections which he so forcibly met, was that which declared that "the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign States, citizens, or subjects." It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the Federal courts to entertain suits against a State, brought by the citizens of another State, or of a foreign State. Adhering to the mere letter, it might be so; and so, in fact, the Supreme Court held in *Chisholm v. Georgia*; but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right, — as the people of the United States in their sovereign capacity subsequently decided.

But Hamilton was not alone in protesting against the construction put upon the Constitution by its opponents. In the Virginia Convention the same objections were raised by George Mason and Patrick Henry, and were met by Madison and Marshall as follows. Madison said: "Its jurisdiction [the Federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the State courts. . . . It appears to me that this [clause] can have no operation but this — to give a citizen a right to be heard in the Federal courts; and if a State should condescend to be a party, this court may take cognizance of it." 3 Elliott's Debates, 2d ed. 533. Marshall, in answer to the same objection, said: "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the Bar of the Federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . . But, say they, there will be partiality in it if a State cannot be defendant — if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff." *Ib.* 555.

It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or

dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the Federal courts, whilst the idea of suits by citizens of other States, or of foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn. v. Lord Baltimore*, 1 Ves. Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App. 1. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 288, 289, and cases there cited.

The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. *Osborn v. Bank of United States*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 208; *Board of Liquidation v. McComb*, 92 U. S. 531; *United States v. Lee*, 106 U. S. 196; *Poindexter v. Greenhow*, 109 U. S. 63; *Virginia Coupon Cases*, 114 U. S. 269. In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained.

Mr. Webster stated the law with precision in his letter to Baring Brothers & Co., of October 16, 1839. Works, vol. vi., 537, 539.



"The security for State loans," he said, "is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfil its engagements."

In *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 321, Mr. Justice McLean, delivering the opinion of the court, said: "What means of enforcing payment from the State had the holder of a bill of credit? It is said by the counsel for the plaintiffs, that he could have sued the State. But was a State liable to be sued? . . . No sovereign State is liable to be sued without her consent. Under the Articles of Confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution."

"It may be accepted as a point of departure unquestioned," said Mr. Justice Miller, in *Cunningham v. Macon & Brunswick Railroad*, 109 U. S. 446, 451, "that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution."

Undoubtedly a State may be sued by its own consent, as was the case in *Curran v. Arkansas, et al.*, 15 How. 304, 309, and in *Clark v. Barnard*, 108 U. S. 436, 447. The suit in the former case was prosecuted by virtue of a State law which the legislature passed in conformity to the Constitution of that State. But this court decided, in *Beers et al. v. Arkansas*, 20 How. 527, 529, that the State could repeal that law at any time; that it was not a contract within the terms of the Constitution prohibiting the passage of State laws impairing the obligation of a contract. In that case the law allowing the State to be sued was modified, pending certain suits against the State on its bonds, so as to require the bonds to be filed in court, which was objected to as an unconstitutional change of the law. Chief Justice Taney, delivering the opinion of the court, said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. . . . The prior law was not a contract. It was an ordinary Act of legislation, prescribing the conditions upon which the State

consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this power the State violated no contract with the parties." The same doctrine was held in *Railroad Company v. Tennessee*, 101 U. S. 337, 339; *Railroad Company v. Alabama*, 101 U. S. 832; and *In re Ayers*, 123 U. S. 443, 505.

But besides the presumption that no anomalous and unheard of proceedings or suits were intended to be raised up by the Constitution — anomalous and unheard of when the Constitution was adopted — an additional reason why the jurisdiction claimed for the Circuit Court does not exist, is the language of the Act of Congress by which its jurisdiction is conferred. The words are these: "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties," etc. — "Concurrent with the courts of the several States." Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The State courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power? It is true that the same qualification existed in the Judiciary Act of 1789, which was before the court in *Chisholm v. Georgia*, and the majority of the court did not think that it was sufficient to limit the jurisdiction of the Circuit Court. Justice Iredell thought differently. In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard.

Some reliance is placed by the plaintiff upon the observations of Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 264, 410. The Chief Justice was there considering the power of review exercisable by this court over the judgments of a State court, wherein it might be necessary to make the State itself a defendant in error. He showed that this power was absolutely necessary in order to enable the judiciary of the United States to take cognizance of all cases arising under the Constitution and laws of the United States. He also showed that making a State a defendant in error was entirely different from suing

a State in an original action in prosecution of a demand against it, and was not within the meaning of the Eleventh Amendment; that the prosecution of a writ of error against a State was not the prosecution of a suit in the sense of that amendment, which had reference to the prosecution, by suit, of claims against a State. [Here follows a quotation from the opinion in *Cohens v. Virginia*, which is found on p. 290, *ante*, beginning "Where, then, a State," &c.]

After thus showing by incontestable argument that a writ of error to a judgment recovered by a State, in which the State is necessarily the defendant in error, is not a suit commenced or prosecuted against a State in the sense of the amendment, he added, that if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by "a citizen of another State" or "of any foreign State," and so was not affected by the amendment; but was governed by the general grant of judicial power, as extending "to all cases arising under the Constitution or laws of the United States, without respect to parties." p. 412.

It must be conceded that the last observation of the Chief Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extra-judicial*, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. With regard to the question then before the court, it may be observed, that writs of error to judgments in favor of the Crown, or of the State, had been known to the law from time immemorial; and had never been considered as exceptions to the rule, that an action does not lie against the sovereign.

To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the legislature, and not the courts,

is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

The judgment of the Circuit Court is

*Affirmed.*

MR. JUSTICE HARLAN concurring. I concur with the court in holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued. Upon this ground alone I assent to the judgment. But I cannot give my assent to many things said in the opinion. The comments made upon the decision in *Chisholm v. Georgia* do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.<sup>1</sup>

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### STATE OF TEXAS v. WHITE.

SUPREME COURT OF THE UNITED STATES. 1868.

[7 Wall, 700.]

. . . THE case was argued by *Messrs. Paschal* and *Merrick*, in behalf of Texas; and *contra*, by *Mr. Phillips*, for White; *Mr. Pike*, for Chiles; *Mr. Carlisle*, for Hardenberg; and *Mr. Moore*, for Birch, Murray, & Co.

THE CHIEF JUSTICE delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National Government, and to compel the surrender of the bonds to the State.

It appears from the bill, answers, and proofs, that the United States, by Act of September 9, 1850, offered to the State of Texas, in compensation for her claims connected with the settlement of her boundary, \$10,000,000 in five per cent bonds, each for the sum of \$1,000; and that this offer was accepted by Texas. One half of these bonds were retained for certain purposes in the National Treasury, and the other half were delivered to the State. The bonds thus delivered were dated January 1, 1851, and were all made payable to the State of Texas, or

<sup>1</sup> See *N. H. v. La. et al.*, 108 U. S. 76; and with that compare 2 Life B. R. Curtis, 93, 146, and 12 Am. Law Rev. 625. — ED.

bearer, and redeemable after the 31st day of December, 1864. They were received in behalf of the State by the comptroller of public accounts, under authority of an Act of the Legislature, which, besides giving that authority, provided that no bond should be available in the hands of any holder until after indorsement by the Governor of the State.

After the breaking out of the rebellion, the insurgent Legislature of Texas, on the 11th of January, 1862, repealed the Act requiring the indorsement of the Governor (Acts of Texas, 1862, 45), and on the same day provided for the organization of a military board, composed of the Governor, comptroller, and treasurer; and authorized a majority of that board to provide for the defence of the State by means of any bonds in the treasury, upon any account, to the extent of \$1,000,000. Texas Laws, 55. The defence contemplated by the Act was to be made against the United States by war. Under this authority the military board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale to them of one hundred and thirty-five of these bonds, then in the treasury of the State, and seventy-six more, then deposited with Droege & Co., in England; in payment for which they engaged to deliver to the board a large quantity of cotton cards and medicines. This agreement was made on the 12th of January, 1865. On the 12th of March, 1865, White and Chiles received from the military board one hundred and thirty-five of these bonds, none of which were indorsed by any governor of Texas. Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants, by purchase, or as security for advances of money.

Such is a brief outline of the case. It will be necessary hereafter to refer more in detail to some particular circumstances of it.

The first inquiries to which our attention was directed by counsel, arose upon the allegations of the answer of Chiles (1) that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and government of the United States, has so far changed her status as to be disabled from prosecuting suits in the national courts.

The first of these allegations is disproved by the evidence. A letter of authority, the authenticity of which is not disputed, has been produced, in which J. W. Throckmorton, elected governor under the Constitution adopted in 1866, and proceeding under an Act of the State Legislature relating to these bonds, expressly ratifies and confirms the action of the solicitors who filed the bill, and empowers them to prosecute this suit; and it is further proved by the affidavit of Mr. Paschal, counsel for the complainant, that he was duly appointed by Andrew J. Hamilton, while provisional governor of Texas, to represent the State

of Texas in reference to the bonds in controversy, and that his appointment has been renewed by E. M. Pease, the actual Governor. If Texas was a State of the Union at the time of these Acts, and these persons, or either of them, were competent to represent the State, this proof leaves no doubt upon the question of authority.

The other allegation presents a question of jurisdiction. . . .

The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guarantees of republican government in the Union, attached at once to the State. The Act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the Acts of her Legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any Act or declaration of any department of the national government, but entirely in accordance with the whole series of such Acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the national government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist

while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the national government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the national authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative Acts of like tendency, must be complete enfranchisement. Wherever the national forces obtained control, the slaves became freemen. Support to the Acts of Congress and the proclamation of the President, concerning slaves, was made a condition of amnesty (13 Stat. at Large, 737) by President Lincoln, in December, 1863, and

by President Johnson, in May, 1865. *Ib.* 758. And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three fourths of the States. *Ib.* 774-775.

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guarantee.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old Constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guarantee clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the national government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper Constitutional relations. A convention was accordingly assembled, the Constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the national forces, or take measures, in any State, for the restoration of State government



faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But the power to carry into effect the clause of guarantee is primarily a legislative power, and resides in Congress. "Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not."

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island (*Luther v. Borden*, 7 Howard, 42), arising from the organization of opposing governments in that State. And we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the Acts known as the Reconstruction Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these Acts.

But it is important to observe that these Acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the Act of March 2, 1867 (14 Stat. at Large, 428), the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary Act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the Act of March 2, that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the consti-

tutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress. It suffices to say, that the terms of the Acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the Constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence. . . .

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

MR. JUSTICE GRIER, dissenting. I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and decided in this case.

The first question in order is the jurisdiction of the court to entertain this bill in behalf of the State of Texas.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common-sense manner by Chief Justice Marshall, in the case of *Hepburn & Dundass v. Ellzey*, 2 Cranch, 452. As the case is short, I hope to be excused for a full report of it, as stated and decided by the court.<sup>1</sup>

<sup>1</sup> For this case, see *post*, p. 348. — Ed.

He says: . . . "These clauses show that the word 'State' is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations."

Now we have here a clear and well-defined test by which we may arrive at a conclusion with regard to the questions of fact now to be decided.

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The Act of Congress of March 2d, 1867, declares Texas to be a "rebel State," and provides for its government until a legal and republican State government could be legally established. It constituted Louisiana and Texas the fifth military district, and made it subject, not to the civil authority, but to the "military authorities of the United States."

It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the State's being in the Union; Dakota is no State, and yet the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?

Now, by assuming or admitting as a fact the present status of Texas as a State not in the Union politically, I beg leave to protest against any charge of inconsistency as to judicial opinions heretofore expressed as a member of this court, or silently assented to. I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination, and keep her in pupilage. I can only submit to the fact as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. Politically, Texas is not a State in this Union. Whether rightfully out of it or not is a question not before the court. . . .

MR. JUSTICE SWAYNE: I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case, I agree with the majority of my brethren.

I am authorized to say that my brother MILLER unites with me in these views.

UNITED STATES *v.* THE STATE OF TEXAS.

SUPREME COURT OF THE UNITED STATES. 1891.

[143 U. S. 621.]<sup>1</sup>

*Mr. A. H. Garland* for the State of Texas, in support of the demurrer. *Mr. John Hancock*, *Mr. George Clark*, *Mr. C. A. Culbertson*, and *Mr. H. J. May* were with him on the brief.

*Mr. Edgar Allan* (with whom was *Mr. Attorney-General* on the brief) for the United States, opposing.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought by original bill in this court pursuant to the Act of May 2, 1890, providing a temporary government for the Territory of Oklahoma. The 25th section recites the existence of a controversy between the United States and the State of Texas as to the ownership of what is designated on the map of Texas as Greer County, and provides that the Act shall not be construed to apply to that county until the title to the same has been adjudicated and determined to be in the United States. In order that there might be a speedy and final judicial determination of this controversy the Attorney-General of the United States was authorized and directed to commence and prosecute on behalf of the United States a proper suit in equity in this court against the State of Texas, setting forth the title of the United States to the country lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary. 26 Stat. 81, 92, c. 182, § 25.

The State of Texas appeared and filed a demurrer, and, also, an answer denying the material allegations of the bill. The case is now before the court only upon the demurrer, the principal grounds of which are: That the question presented is political in its nature and character, and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the Constitution and laws of the United States; that it is not competent for the general government to bring suit against a State of the Union in one of its own courts, especially when the right to be maintained is mutually asserted by the United States and the State, namely, the ownership of certain designated territory; and that the plaintiff's cause of action, being a suit to recover real property, is legal and not equitable, and, consequently, so much of the Act of May 2, 1890, as authorizes and directs the prosecution of a suit in equity to determine the rights of the United States to the territory in question is unconstitutional and void. . . .

The bill alleges that the State of Texas, without right, claims, has taken possession of, and endeavors to extend its laws and jurisdiction

<sup>1</sup> The statement of facts is omitted. — Ed.

over, the disputed territory, in violation of the treaty rights of the United States; that, during the year 1887, it gave public notice of its purpose to survey and place upon the market for sale, and otherwise dispose of, that territory; and that, in consequence of its proceeding to eject *bona fide* settlers from certain portions thereof, President Cleveland, by proclamation issued December 30, 1887, warned all persons, whether claiming to act as officers of the county of Greer, or otherwise, against selling or disposing of, or attempting to sell or dispose of, any of said lands, or from exercising or attempting to exercise any authority over them, and "against purchasing any part of said territory from any person or persons whatever." 25 Stat. 1483.

The relief asked is a decree determining the true line between the United States and the State of Texas, and whether the land constituting what is called "Greer County" is within the boundary and jurisdiction of the United States or of the State of Texas. The government prays that its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require.

In support of the contention that the ascertainment of the boundary between a Territory of the United States and one of the States of the Union is political in its nature and character, and not susceptible of judicial determination, the defendant cites *Foster v. Neilson*, 2 Pet. 253, 307, 309; *Cherokee Nation v. Georgia*, 5 Pet. 1, 21; *United States v. Arredondo*, 6 Pet. 691, 711; and *Garcia v. Lee*, 12 Pet. 511, 517. . . .

These authorities do not control the present case. They relate to questions of boundary between independent nations, and have no application to a question of that character arising between the general government and one of the States composing the Union, or between two States of the Union. By the Articles of Confederation, Congress was made "the last resort on appeal in all disputes and differences" then subsisting or which thereafter might arise "between two or more States concerning boundary, jurisdiction, or any other cause whatever;" the authority so conferred to be exercised by a special tribunal to be organized in the mode prescribed in those Articles, and its judgment to be final and conclusive. Art. 9. At the time of the adoption of the Constitution, there existed, as this court said in *Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more States. And that a controversy between two or more States, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court.

The cases of *Rhode Island v. Massachusetts*, 12 Pet. 657; *New Jersey v. New York*, 5 Pet. 284, 290; *Missouri v. Iowa*, 7 How. 660; *Florida v. Georgia*, 17 How. 478; *Alabama v. Georgia*, 23 How. 505; *Virginia v. West Virginia*, 11 Wall. 39, 55; *Missouri v. Kentucky*, 11 Wall. 395; *Indiana v. Kentucky*, 136 U. S. 479; and *Nebraska v. Iowa*, ante, 359, were all original suits, in this court, for the judicial determination of disputed boundary lines between States. In *New Jersey v. New York*, 5 Pet. 284, 290, Chief Justice Marshall said: "It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing Acts of Congress." And in *Virginia v. West Virginia*, it was said by Mr. Justice Miller to be the established doctrine of this court, "that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." So, in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 287, 288; "By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States. . . . As to 'controversies between two or more States.' The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the revolution by the king in council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress."

In view of these cases, it cannot, with propriety, be said that a question of boundary between a Territory of the United States and one of the States of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy. The important question therefore is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached — and it seems that one is not probable — and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas — that State consenting that its courts may be open for the assertion of claims against it by the United

States — or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitution. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the State tribunals." Story Const. § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States v. North Carolina*, 136 U. S. 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits. . . .

It is apparent upon the face of these clauses [Const. U. S. art. 3, § 2, and the Eleventh Amendment] that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of controversy. *Cohens v. Virginia*, 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends. That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared — as was done by the Judiciary Act of 1789 — that "the Supreme Court shall have exclusive jurisdic-

tion of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. Stat. § 687; Act of September 24, 1789, c. 20, § 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?

The words, in the Constitution, "in all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff. It is admitted that these words do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws and treaties of the United States, because the judicial power of the United States does not extend to suits of *individuals* against States. *Hans v. Louisiana*, 134 U. S. 1, and authorities there cited; *North Carolina v. Temple*, 134 U. S. 22, 30. It is, however, said that the words last quoted refer only to suits in which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign State. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States—are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States "to *all* cases," in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction "in *all* cases" "in which a State shall be party," that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the general government. They could not have overlooked the possibility



that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State. . . .

That case [*Hans v. La.*, 134 U. S. 1] and others in this court relating to the suability of States, proceeded upon the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an *individual* without its consent."

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," *McCulloch v. State of Maryland*, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States.

We are of opinion that this court has jurisdiction to determine

the disputed question of boundary between the United States and Texas. . . .

It is not a suit simply to determine the legal title to, and the ownership of, the lands constituting Greer County. It involves the larger question of governmental authority and jurisdiction over that territory. The United States, in effect, asks the specific execution of the terms of the treaty of 1819, to the end that the disorder and public mischiefs that will ensue from a continuance of the present condition of things may be prevented. The agreement, embodied in the treaty, to fix the lines with precision, and to place landmarks to designate the limits of the two contracting nations, could not well be enforced by an action at law. The bill and amended bill make a case for the interposition of a court of equity.

*Demurrer overruled.*

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting.

MR. JUSTICE LAMAR and myself are unable to concur in the decision just announced.

This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to "controversies between two or more States;" "between a State and citizens of another State;" and "between a State or the citizens thereof, and foreign States, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case is not within the original jurisdiction of the court.

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### THE STATE OF TENNESSEE v. DAVIS. .

SUPREME COURT OF THE UNITED STATES. 1879.

[100 U. S. 257.]

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Middle District of Tennessee. . . .

The record having been returned, in compliance with the writ, a motion was made to remand the case to the State court; and, on the hearing of the motion, the judges were divided in opinion upon the following questions, which are certified here:—

*First*, Whether an indictment of a revenue officer (of the United States) for murder, found in a State court, under the facts alleged in the petition for removal in this case, is removable to the Circuit Court of the United States, under sect. 643 of the Revised Statutes.

*Second*, Whether, if removable from the State court, there is any mode and manner of procedure in the trial prescribed by the Act of Congress.

*Third*, Whether, if not, a trial of the guilt or innocence of the defendant can be had in the United States Circuit Court.

*Mr. Benjamin J. Lea*, Attorney-General of Tennessee, and *Mr. James G. Field*, for the plaintiff in error.

*Mr. Attorney-General Devens* and *Mr. Assistant Attorney-General Smith*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

The first of the questions certified is one of great importance, bringing as it does into consideration the relation of the general government to the government of the States, and bringing also into view not merely the construction of an Act of Congress, but its constitutionality. That in this case the defendant's petition for removal of the cause was in the form prescribed by the Act of Congress admits of no doubt. It represented that he had been indicted for murder in the Circuit Court of Grundy County, and that the indictment and criminal prosecution were still pending. It represented further, that no murder was committed, but that, on the other hand, the killing was committed in the petitioner's own necessary self-defence, to save his own life; that at the time when the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and that the act for which he was indicted was performed in his own necessary self-defence while engaged in the discharge of his duties as deputy collector; that he was acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his office, to wit, as deputy collector of internal revenue; that it was his duty to seize illicit distilleries and the apparatus that is used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce the revenue laws of the United States, as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defence of his life he returned the fire. The petition was verified by oath, and the certificate required by the Act of Congress to be given by the petitioner's legal counsel was appended thereto. There is, therefore, no room for reasonable doubt that a case was made for the removal of the indictment into the Circuit Court of the United States, if sect. 643 of the Revised Statutes embraces criminal prosecutions in a State court, and makes them removable, and if that Act of Congress was not unauthorized by the Constitution. The language of the statute (so far as it is necessary at present to refer to it) is as follows: "When any civil suit or criminal prosecution is commenced in any court of a State

against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law," the case may be removed into the Federal Court. Now, certainly the petition for the removal represented that the act for which the defendant was indicted was done not merely under color of his office as a revenue collector, or under color of the revenue laws, not merely while he was engaged in performing his duties as a revenue officer, but that it was done under and by right of his office, and while he was resisted by an armed force in his attempts to discharge his official duty. This is more than a claim of right and authority under the law of the United States for the act for which he has been indicted. It is a positive assertion of the existence of such authority. But the Act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a Federal officer. It makes such a claim a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.

That the Act of Congress does provide for the removal of criminal prosecutions for offences against the State laws, when there arises in them the claim of the Federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering State criminal laws by other courts than those established by the State. It has been strenuously urged that murder within a State is not made a crime by any Act of Congress, and that it is an offence against the peace and dignity of the State alone. Hence it is inferred that its trial and punishment can be conducted only in State tribunals, and it is argued that the Act of Congress cannot mean what it says, but that it must intend only such prosecutions in State courts as are for offences against the United States, — offences against the revenue laws. But there can be no criminal prosecution initiated in any State court for that which is merely an offence against the general government. If, therefore, the statute is to be allowed any meaning, when it speaks of criminal prosecutions in State courts, it must intend those that are instituted for alleged violations of State laws, in which defences are set up or claimed under United States laws or authority.

We come, then, to the inquiry, most discussed during the argument, whether sect. 643 is a constitutional exercise of the power vested in Congress. Has the Constitution conferred upon Congress the power to authorize the removal, from a State court to a Federal court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided

therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in *Martin v. Hunter*, 1 Wheat. 363, "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, — if their protection must be left to the action of the State court, — the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States Court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

By the last clause of the eighth section of the first article of the Constitution, Congress is invested with power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. Among these is the judicial power of the government. That is declared by the second section of the third article to "extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," &c. This provision embraces alike civil and criminal cases arising under the Constitution and laws. *Cohens v. Virginia*, 6 Wheat. 264. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one. And a

case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted. Story on the Constitution, sect. 1647; 6 Wheat. 379. It was said in *Osborne v. The Bank of the United States*, 9 Wheat. 738, "When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." And a case arises under the laws of the United States, when it arises out of the implication of the law. Mr. Chief Justice Marshall said, in the case last cited: "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an Act of Congress to imply, without expressing, this very exemption from State control. . . . The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any Act of Congress. It is incidental to, and is implied in, the several Acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security."

The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of Sept. 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from State courts before trial, those doubts soon disappeared. Whether removal from a State to a Federal court is an exercise of appellate jurisdiction, as laid down in Story's Commentaries on the Constitution, sect. 1745, or an indirect mode of exercising original jurisdiction, as intimated in *Railway Company v.*

*Whitton*, 13 Wall. 270, we need not now inquire. Be it one or the other, it was ruled in the case last cited to be constitutional. But if there is power in Congress to direct a removal before trial of a civil case arising under the Constitution or laws of the United States, and direct its removal because such a case has arisen, it is impossible to see why the same power may not order the removal of a criminal prosecution, when a similar case has arisen in it. The judicial power is declared to extend to all cases of the character described, making no distinction between civil and criminal, and the reasons for conferring upon the courts of the national government superior jurisdiction over cases involving authority and rights under the laws of the United States are equally applicable to both. As we have already said, such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential, also, to a uniform and consistent administration of national laws. It is required for the preservation of that supremacy which the Constitution gives to the general government by declaring that the Constitution and laws of the United States made in pursuance thereof, and the treaties made or which shall be made under the authority of the United States, shall be the supreme laws of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the Constitution? If, whenever and wherever a case arises under the Constitution and laws or treaties of the United States, the national government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is, at least, temporarily silenced, instead of being at all times supreme. In criminal as well as in civil proceedings in State courts, cases under the Constitution and laws of the United States might have been expected to arise, as, in fact, they do. Indeed, the powers of the general government and the lawfulness of authority exercised or claimed under it, are quite as frequently in question in criminal cases in State courts as they are in civil cases, in proportion to their number.

The argument so much pressed upon us, that it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offences against the criminal laws of a State, even though the defence presents a case arising out of an Act of Congress, ignores entirely the dual character of our government. It assumes that the States are completely and in all respects sovereign. But when the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the

States ceased to extend. Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State. Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted. The removal of cases arising under those laws, from State into Federal courts, is, therefore, no invasion of State domain. On the contrary, a denial of the right of the general government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

It is true, the Act of 1789 authorized the removal of civil cases only. It did not attempt to confer upon the Federal courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required, the removal of civil cases from State courts into the circuit courts of the United States, and the constitutionality of such authorization has met with general acquiescence. It has been sustained by the decisions of this court.

Nor has the removal of civil cases alone been authorized. On the 4th of February, 1815, an Act was passed (3 Stat. 198) providing that if any suit or prosecution should be commenced in any State court against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeably to the provisions of the Act, or under color thereof, for any act done or omitted to be done as an officer of the customs, or for anything done by virtue of the Act or under color thereof, it might be removed before trial into the Circuit Court of the United States, provided the Act should not apply to any offences involving corporal punishment. This Act expressly applied to a criminal action or prosecution. It was intended to be of short duration, but it was extended by the Act of March 3, 1815 (3 Stat. p. 233, sect. 6), and re-enacted in 1817 for a period of four years.

So, in 1833, by the Act of March 2 (4 *Ib.* c. 57, sect. 3), it was enacted that in any case where suit or prosecution should be commenced in a State court of any State, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States, the suit or prosecution might be removed, before trial, into the Federal Circuit Court of the proper district. The history of this Act is well



known. It was passed in consequence of an attempt by one of the States of the Union to make penal the collection by United States officers within the State of duties under the tariff laws. It was recommended by President Jackson in a special message, and passed in the Senate by a vote of 32 to 1, and in the House by a majority of 92. It undoubtedly embraced both civil and criminal cases. It was so understood and intended when it was passed. The chairman of the Judiciary Committee which introduced the bill said: "It gives the right to remove at any time before trial, but not after judgment has been given, and thus affects in no way the dignity of the State tribunals. Whether in criminal or civil cases, it gives this right of removal. Has Congress power in criminal cases? He would answer the question in the affirmative. Congress had the power to give the right in criminal as well as in civil cases, because the second section of the third article of the Constitution speaks of all cases in law and equity, and these comprehensive terms cover all. . . . It was more necessary that this jurisdiction should be extended over criminal than over civil cases. If it were not admitted that the Federal judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed forever; for a State would have nothing more to do than to declare an act a felony or misdemeanor, to nullify all the laws of the Union."

The provisions of the Act of July 13, 1866 (14 Stat. 171, sect. 67), relative to the removal of suits or prosecutions in State courts against internal revenue officers, provisions re-enacted in sect. 643 of the Revised Statutes, are almost identical with those of the Act of 1833, the only noticeable difference being, that in the latter Act the adjective "criminal" is inserted before the word "prosecution." This made no change in the meaning. The well-understood legal signification of the word "prosecution" is a criminal proceeding at the suit of the government. Thus it appears that all along our history the legislative understanding of the Constitution has been that it authorizes the removal from State courts to the circuit courts of the United States, alike civil and criminal cases, arising under the laws, the Constitution, or treaties.

The subject has more than once been before this court, and it has been fully considered. In *Martin v. Hunter*, 1 Wheat. 304, it was admitted in argument by Messrs. Tucker and Dexter that there might be a removal before judgment, though it was contended there could not be after; but the contention was overruled, and it was declared that Congress might authorize a removal either before or after judgment; that the time, the process, and the manner must be subject to its absolute legislative control. In that case, also, it was said that the remedy of the removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only upon the parties, and not upon the State courts. Judge Story, who delivered the opinion, adding: "In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable, and, in respect to civil suits, there would in many cases be rights without corresponding remedies. . . . In respect to criminal prosecutions there would at once be an end of all control, and

the State decisions would be paramount to the Constitution." The expression that the difficulty in the way of the removal of criminal prosecutions seems admitted to be insurmountable has been laid hold of here, in argument, as a declaration of the court that criminal prosecutions cannot be removed. It is a very shortsighted and unwarranted inference. What the court said was, that the remedy in such cases seems to be insurmountable, if it could not act upon State courts as well as parties; and it was ruled that it does thus act. The expression must be read in its connection. In *Martin v. Hunter* the removal was by writ of error after final judgment in the State court; which certainly seems more an invasion of State jurisdiction than a removal before trial. The case was followed by *Cohens v. Virginia*, 6 *Ib.* 264, a criminal case, in which the defendant set up against a criminal prosecution an authority under an Act of Congress. There it was decided that cases might be removed in which a State was a party. This also was a writ of error after a final judgment; but it, as well as the former case, recognized the right of Congress to authorize removals either before or after trial, and neither case made any distinction between civil and criminal proceedings.

In *The Mayor v. Cooper*, 6 Wall. 247, the validity of the removal Acts of 1863, March 3, sect. 5 of c. 81 (12 Stat. 756), and its amendment of May 11, 1866 (14 *id.* 1866), which embraced not only civil cases but criminal prosecutions, and authorized their removal before trial, came under consideration, and it was sustained. This court then said: The constitutional power is given in general terms. "No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. How jurisdiction shall be acquired by the inferior court" (of the United States), "whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, is not prescribed. This Constitution is silent upon these subjects. They are remitted without check or limitation to the wisdom of the legislature." "Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal cases. Both are within its scope. Nor is it any objection that questions are involved which are not at all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient." The court added: "We entertain no doubt of the constitutionality of the jurisdiction given by the Act under which this case has arisen." See also *Com. v. Ashmun*, 3 Grant Cas. 436; *Ib.* 416-418; *State v. Hoskins*, 77 N. C. 530, decided in 1877, where the constitutionality of sect. 643 of the Revised Statutes was affirmed after a full and instructive discussion.

It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for

alleged offences against State laws from State courts to the circuit courts of the United States, when there arises a Federal question in them, is as ample as its power to authorize the removal of a civil case. Many of the cases referred to, and others, set out with great force the indispensability of such a power to the enforcement of Federal law.

It follows that the first question certified to us from the Circuit Court of Tennessee must be answered in the affirmative.

The second question is, "Whether, if the case be removable from the State court, there is any mode and manner of procedure in the trial prescribed by the Act of Congress."

Whether there is or not is totally immaterial to the inquiry whether the case is removable; and this question can hardly have arisen on the motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in sect. 643, nor in the Act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, grows entirely out of the division of powers between that government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

The third question certified has been sufficiently answered in what we have said respecting the second. It must be answered in the affirmative.

The first question will be answered in the affirmative, and the second is answered as in the opinion.

[The dissenting opinion of Mr. JUSTICE CLIFFORD, with whom Mr. JUSTICE FIELD concurred, is omitted.]<sup>1</sup>

<sup>1</sup> Compare *U. S. v. Reese*, 92 U. S. 214; *Strauder v. West Virginia*, 100 U. S. 303; *Virginia v. Reeves*, *Id.* 313. — ED.

## EX PARTE SIEBOLD.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 U. S. 371.]

PETITION for writ of *habeas corpus*.

The facts are stated in the opinion of the court.

*Mr. Bradley T. Johnson*, for the petitioners.The *Attorney-General*, *contra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The petitioners in this case, Albert Siebold, Walter Tucker, Martin C. Burns, Lewis Coleman, and Henry Bowers, were judges of election at different voting precincts in the city of Baltimore, at the election held in that city, and in the State of Maryland, on the fifth day of November, 1878, at which representatives to the Forty-sixth Congress were voted for.

At the November Term of the Circuit Court of the United States for the District of Maryland, an indictment against each of the petitioners was found in said court, for offences alleged to have been committed by them respectively at their respective precincts whilst being such judges of election; upon which indictments they were severally tried, convicted, and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of *habeas corpus* to be relieved from imprisonment. . . .

These indictments were framed partly under sect. 5515 and partly under sect. 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective franchise, which they are intended to enforce, are within the constitutional power of Congress to enact. If they are not, then it is contended that the Circuit Court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void. . . .

The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

As to the supposed conflict that may arise between the officers appointed by the State and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they

have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are *pro tanto* superseded and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of them. Where there is a disposition to act harmoniously, there is no danger of disturbance between those who have different duties to perform. When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and State governments in a matter in which they have a mutual interest.

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the State officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, State or national. Why not? Penalties for fraud and delinquency are part of the regulations belonging to the subject. If Congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalties to prevent such fraud and delinquency?

It is objected that Congress has no power to enforce State laws or to punish State officers, and especially has no power to punish them for violating the laws of their own State. As a general proposition, this is undoubtedly true; but when, in the performance of their func-

tions, State officers are called upon to fulfil duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfilment? Yet that is the case here. It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, State and national. A violation of duty is an offence against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a representative owes no duty to the national government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States. If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power.

The objection that the laws and regulations, the violation of which is made punishable by the Acts of Congress, are State laws, and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

That the duties devolved on the officers of election are duties which they owe to the United States as well as to the State, is further evinced by the fact that they have always been so regarded by the House of Representatives itself. In most cases of contested elections, the conduct of these officers is examined and scrutinized by that body as a

matter of right; and their failure to perform their duties is often made the ground of decision. Their conduct is justly regarded as subject to the fullest exposure; and the right to examine them personally, and to inspect all their proceedings and papers, has always been maintained. This could not be done, if the officers were amenable only to the supervision of the State government which appointed them.

Another objection made is, that, if Congress can impose penalties for violation of State laws, the officer will be made liable to double punishment for delinquency, — at the suit of the State, and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided; although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained.

In reference to a conviction under a State law for passing counterfeit coin, which was sought to be reversed on the ground that Congress had jurisdiction over that subject, and might inflict punishment for the same offence, Mr. Justice Daniel, speaking for the court, said: "It is almost certain that, in the benignant spirit in which the institutions both of the State and Federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, — unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But, were a contrary course of policy or action either probable or usual, this would by no means justify the conclusion that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." *Fox v. The State of Ohio*, 5 How. 410. The same judge, delivering the opinion of the court in the case of *United States v. Marigold* (9 How. 569) where a conviction was had under an Act of Congress for bringing counterfeit coin into the country, said, in reference to *Fox's Case*: "With the view of avoiding conflict between the State and Federal jurisdictions, this court, in the case of *Fox v. State of Ohio*, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We hold this distinction sound; and the conviction was sustained. The subject came up again for discussion in the case of *Moore v. State of Illinois* (14 Ib. 13), in which the plaintiff in error had been convicted under a State law for harboring and secreting a negro slave, which was contended to be properly an offence

against the United States under the fugitive-slave law of 1793, and not an offence against the State. The objection of double punishment was again raised. Mr. Justice Grier, for the court, said: "Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both." Substantially the same views are expressed in *United States v. Cruikshank* (92 U. S. 542), referring to these cases; and we do not well see how the doctrine they contain can be controverted. A variety of instances may be readily suggested, in which it would be necessary or proper to apply it. Suppose, for example, a State judge having power under the naturalization laws to admit aliens to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the Act of Congress providing penalties for that offence, even though he might also, under the State laws, be indictable for forgery, as well as liable to impeachment? So, if Congress, as it might, should pass a law fixing the standard of weights and measures, and imposing a penalty for sealing false weights and false measures, but leaving to the States the matter of inspecting and sealing those used by the people, would not an offender, filling the office of sealer under a State law, be amenable to the United States as well as to the State?

If the officers of election, in elections for representatives, owe a duty to the United States, and are amenable to that government as well as to the State, — as we think they are, — then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act.

To maintain the contrary proposition, the case of *Commonwealth of Kentucky v. Dennison* (24 How. 66) is confidently relied on by the petitioners' counsel. But there, Congress had imposed a duty upon the Governor of the State which it had no authority to impose. The enforcement of the clause in the Constitution requiring the delivery of fugitives from service was held to belong to the government of the United States, to be effected by its own agents; and Congress had no authority to require the Governor of a State to execute this duty.

We have thus gone over the principal reasons of a special character relied on by the petitioners for maintaining the general proposition for which they contend; namely, that in the regulation of elections for representatives the national and State governments cannot co-operate, but must act exclusively of each other; so that, if Congress assumes to regulate the subject at all, it must assume exclusive control of the whole subject. The more general reason assigned, to wit, that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and



harmonious action on the part of the national and State governments in the election of representatives. It is at most an argument *ab inconvenientē*. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. If the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then the adoption by the State government of a system of regulations might exclude the action of Congress. By first taking jurisdiction of the subject, the State would acquire exclusive jurisdiction in virtue of a well-known principle applicable to courts having co-ordinate jurisdiction over the same matter. But no such equality exists in the present case. The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of State sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity. There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the State and national sovereignties. Generally, the powers given by the Constitution to the government of the United States are given over distinct branches of sovereignty from which the State governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.

In what we have said, it must be remembered that we are dealing only with the subject of elections of representatives to Congress. If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of State or county officers, they will be amenable to Federal jurisdiction; nor do we understand that the

enactments of Congress now under consideration have any application to such acts.

It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which Congress has made. That is not within the pale of our jurisdiction. In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations, with the duties of State officers, or with local prejudices. It could not act at all so as to accomplish any beneficial object in preventing frauds and violence, and securing the faithful performance of duty at the elections, without providing for the presence of officers and agents to carry its regulations into effect. It is also difficult to see how it could attain these objects without imposing proper sanctions and penalties against offenders.

The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify anything. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the State and national governments. It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the State governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our

institutions. But in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.

Several other questions bearing upon the present controversy have been raised by the counsel of the petitioners. Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the Act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land."

This concurrent jurisdiction which the national government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the First Article of the Constitution, it is authorized to exercise over the District of Columbia, and over those places within a State which are purchased by consent of the legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. There its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired.

Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified.

Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course?

This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation.

The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. Without specifying other instances in which this power to preserve order and keep the peace unquestionably exists, take the very case in hand. The counsel for the petitioners concede that Congress may, if it sees fit, assume the entire control and regulation of the election of representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject. Is it possible that Congress could not, in that case, provide for keeping the peace at such elections, and for arresting and punishing those guilty of breaking it? If it could not, its power would be but a shadow and a name. But, if Congress can do this, where is the difference in principle in its making provision for securing the preservation of the peace, so as to give to every citizen his free right to vote without molestation or injury, when it assumes only to supervise the regulations made by the State, and not to supersede them entirely? In our judgment, there is no difference; and, if the power exists in the one case, it exists in the other.

The next point raised is, that the Act of Congress proposes to operate on officers or persons authorized by State laws to perform certain duties under them, and to require them to disobey and disregard State laws when they come in conflict with the Act of Congress; that it thereby of necessity produces collision, and is therefore void. This point has been already fully considered. We have shown, as we think, that, where the regulations of Congress conflict with those of the State, it is the latter which are void, and not the regulations of Congress; and that the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws. . . .

*Application denied.*

MR. JUSTICE CLIFFORD and MR. JUSTICE FIELD dissented.

## IN RE NEAGLE.

SUPREME COURT OF THE UNITED STATES, 1889.

[135 U. S. 1.]

MR. JUSTICE MILLER, on behalf of the court, stated the case as follows:—

This was an appeal by Cunningham, sheriff of the county of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder.

On the 16th day of August, 1889, there was presented to Judge Sawyer, the Circuit Judge of the United States for the Ninth Circuit, embracing the Northern District of California, a petition signed David Neagle, deputy United States marshal, by A. L. Farrish on his behalf. This petition represented that the said Farrish was a deputy marshal duly appointed for the Northern District of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition and at the time of filing it, a duly appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined, and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition. The warrant was as follows:—

“ In the Justice's Court of Stockton Township.

“ STATE OF CALIFORNIA, }  
County of San Joaquin, } ss. :

“ The People of the State of California to any sheriff, constable, marshal, or policeman of said State or of the county of San Joaquin :

“ Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said county of San Joaquin on the 14th day of August, A.D. 1889, in this, that one David S. Terry, a human being then and there being, was wilfully, unlawfully, feloniously, and with malice aforethought shot, killed, and murdered, and accusing Stephen J. Field and David Neagle thereof: You are therefore commanded forthwith to arrest the above-named Stephen J. Field<sup>1</sup> and David Neagle and bring them before me,

<sup>1</sup> The Governor of California, on learning that a warrant had been issued for the arrest of Mr. Justice Field, promptly wrote to the Attorney-General of the State, urging “ the propriety of at once instructing the District Attorney of San Joaquin County to dismiss the unwarranted proceeding against him,” as his arrest “ would

at my office, in the city of Stockton, or, in case of my absence or inability to act, before the nearest and most accessible magistrate in the county.

"Dated at Stockton this 14th day of August, A.D. 1889.

"H. V. J. SWAIN,

*"Justice of the Peace."*

"The defendant, David Neagle, having been brought before me on this warrant, is committed for examination to the sheriff of San Joaquin County, California.

"Dated August 15, 1889.

H. V. J. SWAIN,

*"Justice of the Peace."*

The petition then recited the circumstances of a *rencontre* between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter and of what led to it will be considered with more particularity hereafter. The main allegation of this petition was that Neagle, as United States deputy marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney-General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the Supreme Court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defence of the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation was very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the Circuit Court at that place. The allegation was also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It was also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham was in violation of the laws and Constitution of the United States, and that he was in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farrish, and presented to Judge Sawyer, he made the following order:—

be a burning disgrace to the State unless disavowed." The Attorney-General as promptly responded by advising the District Attorney that there was "no evidence to implicate Justice Field in said shooting," and that "public justice demands that the charge against him be dismissed;" which was accordingly done.

"Let a writ of *habeas corpus* issue in pursuance of the prayer of the within petition, returnable before the United States Circuit Court for the Northern District of California.

"SAWYER, *Circuit Judge*."

The writ was accordingly issued and delivered to Cunningham, who made the following return:—

"COUNTY OF SAN JOAQUIN, *State of California*,  
"SHERIFF'S OFFICE.

"To the honorable Circuit Court of the United States for the Northern District of California :

"I hereby certify and return that before the coming to me of the annexed writ of *habeas corpus* the said David Neagle was committed to my custody, and is detained by me by virtue of a warrant issued out of the justice's court of Stockton township, State of California, county of San Joaquin, and by the indorsement made upon said warrant. Copy of said warrant and indorsement is annexed hereto and made a part of this return. Nevertheless, I have the body of the said David Neagle before the honorable court, as I am in the said writ commanded.

"August 17, 1889.

THOMAS CUNNINGHAM,

"*Sheriff San Joaquin County, California*."

Various pleadings and amended pleadings were made which do not tend much to the elucidation of the matter before us. Cunningham filed a demurrer to the petition for the writ of *habeas corpus*, and Neagle filed a traverse to the return of the sheriff, which was accompanied by exhibits, the substance of which will be hereafter considered when the case comes to be examined upon its facts.

The hearing in the Circuit Court was had before Circuit Judge Sawyer and District Judge Sabin. The sheriff, Cunningham, was represented by G. A. Johnson, Attorney-General of the State of California, and other counsel. A large body of testimony, documentary and otherwise, was submitted to the court, on which, after a full consideration of the subject, the court made the following order:

"In the Matter of David Neagle, on *habeas corpus*.

"In the above-entitled matter, the court having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the court that the allegations of the petitioner in his amended answer or traverse to the return of the sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody."

From that order an appeal was allowed which brought the case to this court, accompanied by a voluminous record of all the matters which were before the court on the hearing.

*Z. Montgomery, G. A. Johnson*, Attorney-General of the State of California, *Samuel Shellabarger*, and *Jeremiah M. Wilson*, for the appellant. *Attorney-General Miller*, and *Joseph H. Choate* (with whom was *James C. Carter* on the brief), for the appellee.

MR. JUSTICE MILLER, after stating the case as above, delivered the opinion of the court.

If it be true, as stated in the order of the court discharging the prisoner, that he was held "in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States," there does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the Circuit Court. . . .

These are the material circumstances produced in evidence before the Circuit Court on the hearing of this *habeas corpus* case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, travelling with him, and aware of all the previous relations of Terry to the judge, — as he was, — of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defence of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offence, unless there be found in aid of the defence of the prisoner some element of power and authority asserted under the government of the United States. . . .

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of *habeas corpus* must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it



necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an Act of Congress. It is not supposed that any special Act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody "for an act done or omitted in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States."

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed.

If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of a disagreeable duty, than the fact that if he was murdered his murderer would be subject to the laws of a State and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind of insulting him and assaulting him and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies.

We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected. . . .

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by Act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by Acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by Acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfil the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of Acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

One of the most remarkable episodes in the history of our foreign

relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop-of-war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hülseman, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what Act of Congress then existing can any one lay his finger in support of the action of our government in this matter?

So, if the President or the Postmaster-General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells v. Nickles*, 104 U. S. 444. That was a case in which a class of men appointed by

local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful." But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands. . . .

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already recited in this opinion between the marshal of the Northern District of California, and the Attorney-General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the Attorney-General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defence of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. . . .

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where,

like this, it was evidently a question of the choice of who should be killed, the assailant and violater of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States. . . .

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

*We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.*

[The dissenting opinion of Mr. JUSTICE LAMAR, with whom CHIEF JUSTICE FULLER concurred, is omitted.]

IN *Logan v. United States*, 144 U. S. 263 (1891), on error to the Circuit Court of the United States for the Northern District of Texas, where Logan and others had been indicted for the statutory offence of conspiracy to injure and oppress citizens of the United States in the free exercise of a right secured to them by the Constitution and laws of the United States and for murder in pursuance thereof, and were convicted of the conspiracy and duly sentenced, — exceptions were taken to various rulings and instructions. MR. JUSTICE GRAY (for the court) said: "The principal question in this case is whether the right of a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offence against the United States, to be protected against lawless violence, is a right secured to him by the Constitution or laws of the United States, or whether it is a right which can be vindicated only under the laws of the several States.

"This question is presented by the record in several forms. It was raised in the first instance by the defendants 'excepting to' and moving to quash the indictment. A motion to quash an indictment is ordinarily addressed to the discretion of the court, and therefore a refusal to quash cannot generally be assigned for error. *United States v. Rosenburgh*, 7 Wall. 580. *United States v. Hamilton*, 109 U. S. 63. But the motion in this case appears to have been intended and understood to include an exception, which, according to the practice in Louisiana and Texas, is equivalent to a demurrer. And the same question is distinctly presented by the judge's refusal to instruct the jury as requested, and by the instructions given by him to the jury.

"Upon this question, the court has no doubt. As was said by Chief Justice Marshall, in the great case of *McCulloch v. Maryland*, 'The government of the Union, though limited in its powers, is supreme within its sphere of action.' 'No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution.' 4 Wheat. 316, 405, 424.

"Among the powers which the Constitution expressly confers upon Congress is the power to make all laws necessary and proper for carrying into execution the powers specifically granted to it, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. In the exercise of this general power of legislation, Congress may use any means appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution. *McCulloch v. Maryland*, 4 Wheat. 316, 421; *Juilliard v. Greenman*, 110 U. S. 421, 440, 441.

"Although the Constitution contains no grant, general or specific, to Congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offences against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of Congress to provide for the punishment of all crimes and offences against the United States, whether committed within one of the States of the Union, or within territory over which Congress has plenary and exclusive jurisdiction.

"To accomplish this end, Congress has the right to enact laws for the arrest and commitment of those accused of any such crime or offence, and for holding them in safe custody until indictment and trial; and persons arrested and held pursuant to such laws are in the exclu-

sive custody of the United States, and are not subject to the judicial process or executive warrant of any State. *Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Robb v. Connolly*, 111 U. S. 624. The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and laws of the United States.

"The statutes of the United States have provided that any person accused of a crime or offence against the United States may by any United States judge or commissioner of a Circuit Court be arrested and confined, or bailed, as the case may be, for trial before the court of the United States having cognizance of the offence; and, if bailed, may be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for the offence, and be thereupon recommitted to the custody of the marshal, to be held until discharged by due course of law. Rev. Stat. §§ 1014, 1018. They have also provided that all the expenses attendant upon the transportation from place to place, and upon the temporary or permanent confinement, of persons arrested or committed under the laws of the United States, shall be paid out of the Treasury of the United States; and that the marshal, in case of necessity, may provide a convenient place for a temporary jail, and 'shall make such other provision as he may deem expedient and necessary for the safe-keeping of the prisoners arrested or committed under the authority of the United States, until permanent provision for that purpose is made by law.' Rev. Stat. §§ 5586-5588.

"In the case at bar, the indictments alleged, the evidence at the trial tended to prove, and the jury have found by their verdict, that while Charles Marlow and five others, citizens of the United States, were in the custody and control of a deputy marshal of the United States under writs of commitment from a commissioner of the Circuit Court, in default of bail, to answer to indictments for an offence against the laws of the United States, the plaintiffs in error conspired to injure and oppress them in the free exercise and enjoyment of the right, secured to them by the Constitution and laws of the United States, to be protected, while in such custody and control of the deputy marshal, against assault and bodily harm, until they had been discharged by due process of the laws of the United States.

"If, as some of the evidence introduced by the government tended to show, the deputy marshal and his assistants made no attempt to protect the prisoners, but were in league and collusion with the conspirators, that does not lessen or impair the right of protection, secured to the prisoners by the Constitution and laws of the United States.

"The prisoners were in the exclusive custody and control of the United States, under the protection of the United States, and in the

peace of the United States. There was a co-extensive duty on the part of the United States to protect against lawless violence persons so within their custody, control, protection, and peace; and a corresponding right of those persons, secured by the Constitution and laws of the United States, to be so protected by the United States. If the officers of the United States, charged with the performance of the duty, in behalf of the United States, of affording that protection and securing that right, neglected or violated their duty, the prisoners were not the less under the shield and panoply of the United States.

"The cases heretofore decided by this court, and cited in behalf of the plaintiffs in error, are in no way inconsistent with these views, but, on the contrary, contain much to support them. The matter considered in each of those cases was whether the particular right there in question was secured by the Constitution of the United States, and was within the Acts of Congress. But the question before us is so important, and the learned counsel for the plaintiffs in error have so strongly relied on those cases, that it is fit to review them in detail. . . .

"The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

"Among the particular rights which this court, as we have seen, has adjudged to be secured, expressly or by implication, by the Constitution and laws of the United States, and to be within section 5508 of the Revised Statutes, providing for the punishment of conspiracies by individuals to oppress or injure citizens in the free exercise and enjoyment of rights so secured, are the political right of a voter to be protected from violence while exercising his right of suffrage under the laws of the United States; and the private right of a citizen, having made a homestead entry, to be protected from interference while remaining in the possession of the land for the time of occupancy which Congress has enacted shall entitle him to a patent.

"In the case at bar, the right in question does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try, and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and the duty to protect against unlawful interference its prisoners



so held, as well as its executive and judicial officers charged with keeping and trying them.

“In the very recent *Case of Neagle*, 135 U. S. 1, at October Term, 1889, it was held that, although there was no express Act of Congress authorizing the appointment of a deputy marshal or other officer to attend a justice of this court while travelling in his circuit, and to protect him against assault or injury, it was within the power and the duty of the executive department to protect a judge of any of the courts of the United States, when there was just reason to believe that he would be in personal danger while executing the duties of his office; that an assault upon such a judge, while in discharge of his official duties, was a breach of the peace of the United States, as distinguished from the peace of the State in which the assault took place; and that a deputy marshal of the United States, specially charged with the duty of protecting and guarding a judge of a court of the United States, had imposed upon him the duty of doing whatever might be necessary for that purpose, even to the taking of human life.

“In delivering judgment, Mr. Justice Miller, repeating the language used by Mr. Justice Bradley speaking for the court in *Ex parte Siebold*, 100 U. S. 371, 394, said: ‘It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.’ 135 U. S. 60. After further discussion of that question, and of the powers of sheriffs in the State of California, where the transaction took place, Mr. Justice Miller added: ‘That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them.’ 135 U. S. 69.

“The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defence.

"For these reasons, we are of opinion that the crime of which the plaintiffs in error were indicted and convicted was within the reach of the constitutional powers of Congress, and was covered by section 5508 of the Revised Statutes." . . .

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### HEPBURN AND DUNDAS v. ELLZEY.

SUPREME COURT OF THE UNITED STATES. 1804.

[2 *Cranch*, 445 ; 1 *Curtis's Decisions*, 520.]

THIS case came before the court upon a certificate of division of opinion of the judges of the Circuit Court, for the District of Virginia. The question was whether Hepburn and Dundas, the plaintiffs in this cause, who are citizens and residents of the District of Columbia, and are so stated in the pleadings, can maintain an action in this court against the defendant, who is a citizen and inhabitant of the Commonwealth of Virginia, and is also stated so to be in the pleadings, or whether, for want of jurisdiction, the said suit ought not to be dismissed.

MARSHALL, C. J., delivered the opinion of the court.

The question in this case is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia.

This depends on the Act of Congress describing the jurisdiction of that court. That Act gives jurisdiction to the Circuit Courts in cases between a citizen of the State in which the suit is brought, and a citizen of another State. To support the jurisdiction in this case, therefore, it must appear that Columbia is a State.

On the part of the plaintiffs it has been urged that Columbia is a distinct political society ; and is, therefore, "a State," according to the definitions of writers on general law.

This is true. But as the Act of Congress obviously uses the word "State" in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the States contemplated in the Constitution.

The House of Representatives is to be composed of members chosen by the people of the several States ; and each State shall have at least one representative.

The Senate of the United States shall be composed of two senators from each State.

Each State shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives.

These clauses show that the word State is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

Other passages from the Constitution have been cited by the plaintiffs to show that the term State is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every State in the Union, should be closed upon them. But this is a subject for legislative, not for judicial consideration.

The opinion to be certified to the Circuit Court is, that that court has no jurisdiction in the case.<sup>1</sup>

In *Serè et al. v. Pitot et al.*, 6 Cranch, 832 (1810), MARSHALL, C. J., for the court, said: "Whether the citizens of the Territory of Orleans are to be considered as the citizens of a State, within the meaning of the Constitution, is a question of some difficulty, which would be decided, should one of them sue in any of the circuit courts of the United States. The present inquiry is limited to a suit brought by or against a citizen of the Territory, in the District Court of Orleans. The power of governing and of legislating for a Territory is the inevi-

<sup>1</sup> As regards the mere power of Congress, the District of Columbia is supposed to be on the same footing as the Territories. It was formerly sometimes called the "Territory of Columbia."

"Has Congress a right to impose a direct tax on the District of Columbia? . . . The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows, that the power to impose direct taxes also extends throughout the United States." [The court held that a direct tax could be levied on the district.] MARSHALL, C. J. (for the court), in *Loughborough v. Blake*, 5 Wheat. 317 (1820).

In *Geofroy v. Riggs*, 133 U. S. 258 (1889), it was held that the District of Columbia is one of "the States of the Union," within the meaning of Article 7 of the Consular Convention with France, of Feb. 7, 1853, whereby certain rights are secured to Frenchmen in "the States of the Union." — Ed.

table consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the Territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively.

In *New Orleans v. Winter et al.*, 1 Wheat. 91 (1816), MARSHALL, C. J., for the court, said: "The proceedings of the court . . . are arrested *in limine*, by a question respecting its jurisdiction. In the case of *Hepburn & Dundas v. Ellzey*, this court determined, on mature consideration, that a citizen of the District of Columbia could not maintain a suit in the Circuit Court of the United States. That opinion is still retained.

"It has been attempted to distinguish a Territory from the District of Columbia; but the court is of opinion, that this distinction cannot be maintained. They may differ in many respects, but neither of them is a State, in the sense in which that term is used in the Constitution. Every reason assigned for the opinion of the court, that a citizen of Columbia was not capable of suing in the courts of the United States, under the Judiciary Act, is equally applicable to a citizen of a Territory. Gabriel Winter, then, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana."<sup>1</sup>

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THE AMERICAN INSURANCE COMPANY ET AL. v. THREE  
HUNDRED AND FIFTY-SIX BALES OF COTTON, DAVID  
CANTER, CLAIMANT.

SUPREME COURT OF THE UNITED STATES. 1828.

[1 *Peters*, 511. 7 *Curtis's Decisions*, 685.]

*Ogden*, for the appellants [the plaintiffs]; *Whipple* and *Webster*, *contra*.

MARSHALL, C. J., delivered the opinion of the court.

The plaintiffs filed their libel in this cause in the District Court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship "Point a Petre;" which had been insured by them

<sup>1</sup> These rulings [in *Hepburn v. Ellzey* and *New Orleans v. Winter*] have never been disturbed, but the principle asserted has been acted upon ever since by the courts, when the point has arisen. — MILLER, J. (for the court), in *Barney v. Baltimore*, 6 Wall. 280, 287 (1867). — ED.

on a voyage from New Orleans to Havre de Grace, in France. The "Point a Petre" was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold for the purpose of satisfying the salvors; by virtue of a decree of a court consisting of a notary and five jurors, which was erected by an Act of the territorial legislature of Florida. The owners abandoned to the underwriters, who having accepted the same, proceeded against the property, alleging that the sale was not made by order of a court competent to change the property.

David Canter claimed the cotton as a *bona fide* purchaser, under the decree of a competent court, which awarded seventy-six per cent to the salvors on the value of the property saved.

The district judge pronounced the decree of the territorial court a nullity, and awarded restitution to the libellants of such part of the cargo as he supposed to be identified by the evidence, deducting therefrom a salvage of fifty per cent.

The libellants and claimant both appealed. The Circuit Court reversed the decree of the District Court, and decreed the whole cotton to the claimant, with costs, on the ground that the proceedings of the court at Key West were legal, and transferred the property to the purchaser.

From this decree the libellants have appealed to this court.

The cause depends mainly on the question whether the property in the cargo saved was changed by the sale at Key West. The conformity of that sale to the order under which it was made has not been controverted. Its validity has been denied, on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an Act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That Act purports to give the power which has been exercised; consequently, the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any

change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the State.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession, 8 Stats. at Large, 252, contains the following provision: "The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the mean time, Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed "an Act for the establishment of a territorial government in Florida," 3 Stats. at Large, 654, and on the 3d of March, 1823, passed another Act to amend the Act of 1822. Under this Act, the territorial legislature enacted the law now under consideration. . . .

The powers of the Territorial legislature extend to all rightful objects of legislation, subject to the restriction that their laws shall not be "inconsistent with the laws and Constitution of the United States." As salvage is admitted to come within this description, the Act is valid unless it can be brought within the restriction.

The counsel for the libellants contend that it is inconsistent with both the law and the Constitution; that it is inconsistent with the provisions of the law by which the territorial government was created, and with the amendatory Act of March, 1823. It vests, they say, in

an inferior tribunal a jurisdiction which is, by those Acts, vested exclusively in the superior courts of the territory. . . .

The question suggested by this view of the subject, on which the case under consideration must depend, is this :—

Is the admiralty jurisdiction of the district courts of the United States vested in the superior courts of Florida, under the words of the 8th section, declaring that each of the said courts “shall, moreover, have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States,” which was vested in the courts of the Kentucky district?

It is observable that this clause does not confer on the territorial courts all the jurisdiction which is vested in the court of the Kentucky district, but that part of it only which applies to “cases arising under the laws and Constitution of the United States.” Is a case of admiralty of this description?

The Constitution and laws of the United States give jurisdiction to the district courts over all cases in admiralty; but jurisdiction over the case does not constitute the case itself. We are, therefore, to inquire whether cases in admiralty and cases arising under the laws and Constitution of the United States are identical.

If we have recourse to that pure fountain from which all the jurisdiction of the Federal courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares that “the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.”

The Constitution certainly contemplates these as three distinct classes of cases; and, if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them in the Constitution is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise. It is not, then, to the 8th section of the territorial law that we are to look for the grant of admiralty and maritime jurisdiction to the territorial courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the District Court of Kentucky.

It has been contended that, by the Constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested “in one supreme court and in such inferior courts as Congress shall from time to time ordain and establish.” Hence, it has been argued

that Congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the general and of a State Government.

We think, then, that the Act of the territorial legislature erecting the court by whose decree the cargo of the "Point a Petre" was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the Circuit Court, awarding restitution of the property to the claimant, ought to be affirmed, with costs.<sup>1</sup>

<sup>1</sup> In the argument at the Bar, great attention has been paid to the meaning of the word "territory."

Ordinarily, when the territory of a sovereign power is spoken of, it refers to that tract of country which is under the political jurisdiction of that sovereign power. Thus Chief Justice Marshall (in *United States v. Bevens*, 3 Wheat. 386) says: "What, then, is the extent of jurisdiction which a State possesses? We answer, without hesitation, the jurisdiction of a State is coextensive with its territory." Examples might easily be multiplied of this use of the word, but they are unnecessary because it is familiar. But the word "territory" is not used in this broad and general sense in this clause of the Constitution.

At the time of the adoption of the Constitution, the United States held a great tract of country northwest of the Ohio; another tract, then of unknown extent, ceded by South Carolina; and a confident expectation was then entertained, and afterwards realized, that they then were or would become the owners of other great tracts, claimed by North Carolina and Georgia. These ceded tracts lay within the limits of the United States, and out of the limits of any particular State; and the cessions embraced the civil and political jurisdiction, and so much of the soil as had not previously been granted to individuals.

These words, "territory belonging to the United States," were not used in the Constitution to describe an abstraction, but to identify and apply to these actual sub-



jects matter then existing and belonging to the United States, and other similar subjects which might afterwards be acquired; and this being so, all the essential qualities and incidents attending such actual subjects are embraced within the words "territory belonging to the United States," as fully as if each of those essential qualities and incidents had been specifically described.

I say, the essential qualities and incidents. But in determining what were the essential qualities and incidents of the subject with which they were dealing, we must take into consideration not only all the particular facts which were immediately before them, but the great consideration, ever present to the minds of those who framed and adopted the Constitution, that they were making a frame of government for the people of the United States and their posterity, under which they hoped the United States might be, what they have now become, a great and powerful nation, possessing the power to make war and to conclude treaties, and thus to acquire territory. (See *Serè v. Pitot*, 6 Cr. 336; *Am. Ins. Co. v. Canter*, 1 Pet. 542.) With these in view, I turn to examine the clause of the article now in question.

It is said this provision has no application to any territory save that then belonging to the United States. I have already shown that, when the Constitution was framed, a confident expectation was entertained, which was speedily realized, that North Carolina and Georgia would cede their claims to that great territory which lay west of those States. No doubt has been suggested that the first clause of this same article, which enabled Congress to admit new States, refers to and includes new States to be formed out of this territory, expected to be thereafter ceded by North Carolina and Georgia, as well as new States to be formed out of territory northwest of the Ohio, which then had been ceded by Virginia. It must have been seen, therefore, that the same necessity would exist for an authority to dispose of and make all needful regulations respecting this territory, when ceded, as existed for a like authority respecting territory which had been ceded.

No reason has been suggested why any reluctance should have been felt, by the framers of the Constitution, to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance of the dates of the cessions; a circumstance in no way material as respects the necessity for rules and regulations, or the propriety of conferring on the Congress power to make them. And if we look at the course of the debates in the Convention on this article, we shall find that the then unceded lands, so far from having been left out of view in adopting this article, constituted, in the minds of members, a subject of even paramount importance.

Again, in what an extraordinary position would the limitation of this clause to territory then belonging to the United States, place the territory which lay within the chartered limits of North Carolina and Georgia. The title to that territory was then claimed by those States, and by the United States; their respective claims are purposely left unsettled by the express words of this clause; and when cessions were made by those States, they were merely of their claims to this territory, the United States neither admitting nor denying the validity of those claims; so that it was impossible then, and has ever since remained impossible, to know whether this territory did or did not then belong to the United States; and, consequently, to know whether it was within or without the authority conferred by this clause, to dispose of and make rules and regulations respecting the territory of the United States. This attributes to the eminent men who acted on this subject a want of ability and forecast, or a want of attention to the known facts upon which they were acting, in which I cannot concur.

There is not, in my judgment, anything in the language, the history, or the subject-matter of this article, which restricts its operation to territory owned by the United States when the Constitution was adopted.

But it is also insisted that provisions of the Constitution respecting territory belonging to the United States do not apply to territory acquired by treaty from a foreign nation. This objection must rest upon the position that the Constitution did not authorize the Federal government to acquire foreign territory, and con-

sequently has made no provision for its government when acquired; or, that though the acquisition of foreign territory was contemplated by the Constitution, its provisions concerning the admission of new States, and the making of all needful rules and regulations respecting territory belonging to the United States, were not designed to be applicable to territory acquired from foreign nations.

It is undoubtedly true, that at the date of the treaty of 1803, between the United States and France, for the cession of Louisiana, it was made a question, whether the Constitution had conferred on the executive department of the government of the United States power to acquire foreign territory by a treaty.

There is evidence that very grave doubts were then entertained concerning the existence of this power. But that there was then a settled opinion in the executive and legislative branches of the government, that this power did not exist, cannot be admitted, without at the same time imputing to those who negotiated and ratified the treaty, and passed the laws necessary to carry it into execution, a deliberate and known violation of their oaths to support the Constitution; and whatever doubts may then have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different administrations. Six States, formed on such territory, are now in the Union. Every branch of this government, during a period of more than fifty years, has participated in these transactions. To question their validity now, is vain. As was said by Mr. Chief Justice Marshall, in the *American Insurance Company v. Canter* (1 Peters, 542), "the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or treaty." (See *Serè v. Pilot*, 6 Cr. 336.) And I add, it also possesses the power of governing it, when acquired, not by resorting to supposititious powers, nowhere found described in the Constitution, but expressly granted in the authority to make all needful rules and regulations respecting the territory of the United States.

There was to be established by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the Government, and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all territory of the United States, and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument, as it is with its language, and I can have no hesitation in rejecting it.

I construe this clause, therefore, as if it had read, Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil, so far as the soil may be the property of the party making the cession, at the time of making it.

It has been urged that the words "rules and regulations" are not appropriate terms in which to convey authority to make laws for the government of the territory.

But it must be remembered that this is a grant of power to the Congress — that it is therefore necessarily a grant of power to legislate — and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a legislature to make all needful rules and regulations respecting the territory, is a power to pass all needful laws respecting it.

The word regulate, or regulation, is several times used in the Constitution. It is used in the fourth section of the first article to describe those laws of the States which prescribe the times, places, and manner of choosing senators and representatives; in the second section of the fourth article, to designate the legislative action of a State

on the subject of fugitives from service, having a very close relation to the matter of our present inquiry; in the second section of the third article, to empower Congress to fix the extent of the appellate jurisdiction of this court; and, finally, in the eighth section of the first article are the words, "Congress shall have power to regulate commerce."

It is unnecessary to describe the body of legislation which has been enacted under this grant of power; its variety and extent are well known. But it may be mentioned, in passing, that under this power to regulate commerce, Congress has enacted a great system of municipal laws, and extended it over the vessels and crews of the United States on the high seas and in foreign ports, and even over citizens of the United States resident in China; and has established judicatures, with power to inflict even capital punishment within that country.

If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.

Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, not a judicial, question. Whatever Congress deems needful is so, under the grant of power.

Nor am I aware that it has ever been questioned that laws providing for the temporary government of the settlers on the public lands are needful, not only to prepare them for admission to the Union as States, but even to enable the United States to dispose of the lands.

Without government and social order, there can be no property; for without law, its ownership, its use, and the power of disposing of it, cease to exist, in the sense in which those words are used and understood in all civilized States.

Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States, when in the judgment of Congress they should be fitted therefor, since these were the needs provided for, since it is confessed that government is indispensable to provide for those needs, and the power is, to make all needful rules and regulations respecting the territory, I cannot doubt that this is a power to govern the inhabitants of the territory, by such laws as Congress deems needful, until they obtain admission as States.

Whether they should be thus governed solely by laws enacted by Congress, or partly by laws enacted by legislative power conferred by Congress, is one of those questions which depend on the judgment of Congress—a question which of these is needful.—CURTIS, J. in *Dred Scott v. Sandford*, 19 How. 610-615 (1856). Compare Taney, C. J. *Ib.* 432-451.

See *Benner v. Porter*, 9 How. 235; *U. S. v. Guthrie*, 17 How. 284, and *Clinton v. Englebrecht*, 13 Wall. 434 (1871). In the last of these cases, at p. 447, Chase, C. J. (for the court) said: "There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the general government. The courts are the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States."—ED.

## CALLAN v. WILSON.

SUPREME COURT OF THE UNITED STATES. 1887.

[127 U. S. 540.]

THE court stated the case as follows : —

This was an appeal from a judgment refusing, upon writ of *habeas corpus*, to discharge the appellant from the custody of the appellee as Marshal of the District of Columbia. It appears that by an information filed by the United States in the police court of the District, the petitioner, with others, was charged with the crime of conspiracy, and having been found guilty by the court, was sentenced to pay a fine of twenty-five dollars, and upon default in its payment to suffer imprisonment in jail for the period of thirty days. He perfected an appeal to the Supreme Court of the District, but having subsequently withdrawn it, and having refused to pay the fine imposed upon him, he was committed to the custody of the marshal, to the end that the sentence might be carried into effect.

The contention of the petitioner was that he is restrained of his liberty in violation of the Constitution. . . . To this information the defendants interposed a demurrer, which was overruled. They united in requesting a trial by jury. That request was denied, and a trial was had before the court, without the intervention of a jury, and with the result already stated.

*Mr. J. H. Raiston*, for appellant. *Mr. Charles S. Moore* was with him on the brief.

*Mr. Assistant Attorney-General Maury*, for appellee.

MR. JUSTICE HARLAN, after stating the case as above reported, delivered the opinion of the court.

It is contended by the appellant that the Constitution of the United States secured to him the right to be tried by a jury, and, that right having been denied, the police court was without jurisdiction to impose a fine upon him, or to order him to be imprisoned until such fine was paid. This precise question is now, for the first time, presented for determination by this court. If the appellant's position be sustained, it will follow that the statute (Rev. Stat. Dist. Col. § 1064), dispensing with a petit jury, in prosecutions by information in the police court, is inapplicable to cases like the present one.

The third article of the Constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." By the Sixth Amendment it is declared that "in all criminal prosecutions the accused shall

enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The contention of the appellant is, that the offence with which he is charged is a "crime" within the meaning of the third article of the Constitution, and that he was entitled to be tried by a jury; that his trial by the police court, without a jury, was not "due process of law" within the meaning of the Fifth Amendment; and that, in any event, the prosecution against him was a "criminal prosecution," in which he was entitled, by the Sixth Amendment, to a speedy and public trial by an impartial jury.

The contention of the government is, that the Constitution does not require that the right of trial by jury shall be secured to the people of the District of Columbia; that the original provision, that when a crime was not committed within any State "the trial shall be at such place or places as the Congress may by law have directed," had, probably, reference only to offences committed on the high seas; that, in adopting the Sixth Amendment, the people of the States were solicitous about trial by jury in the States and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas, and in the District of Columbia and in places to be thereafter ceded for the purposes, respectively, of a seat of government, forts, magazines, arsenals, and dock-yards; and, consequently, that that amendment should be deemed to have superseded so much of the third article of the Constitution as relates to the trial of crimes by a jury.

Upon a careful examination of this position we are of opinion that it cannot be sustained without violence to the letter and spirit of the Constitution.

The third article of the Constitution provides for a jury in the trial of "all crimes, except in cases of impeachment." The word "crime," in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the Sixth

Amendment. And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them. Mr. Justice Story says that the amendment, "in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed (which district shall be previously ascertained by law), and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes." Story on the Constitution, § 1791. And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this district may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property — especially of the privilege of trial by jury in criminal cases. In the draft of a constitution reported by the Committee of Five on the 6th of August, 1787, in the convention which framed the Constitution, the 4th section of Article XI. read that "the trial of all criminal offences (except in cases of impeachment) shall be in the States where they shall be committed; and shall be by jury." 1 Elliott's Deb. (2d ed.), 229. But that article was, by unanimous vote, amended so as to read: "The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the legislature may direct." *Ib.* 270. The object of thus amending the section, Mr. Madison says, was "to provide for trial by jury of offences committed out of any State." 3 Madison Papers, 144. In *Reynolds v. United States*, 98 U. S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster v. Reid*, 11 How. 437, 460, that the Seventh Amendment secured to them a like right in civil actions at common law. We cannot think that the people of this district have, in that regard, less rights than those accorded to the people of the Territories of the United States.

It is next insisted that the constitutional guarantee of trial by jury in all criminal prosecutions — even supposing it to exist for the people of the district — has not been denied. . . .

The argument, made in behalf of the government, implies that if Congress should provide the police court with a grand jury, and authorize that court to try, without a petit jury, all persons indicted — even for crimes punishable by confinement in the penitentiary — such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the police court, is given an unobstructed right of appeal to, and trial by jury in, another court to which the case may be taken. We cannot assent to that interpretation of the Constitution. Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the district, and the fact was disclosed that he had been adjudged guilty of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty.

For the reasons stated,

*The judgment is reversed, and the cause remanded with directions to discharge the appellant from custody.*

IN *Mormon Church v. United States*, 136 U. S. 1, 42-43 (1889), MR. JUSTICE BRADLEY (for the court) said : —

“The principal questions raised are, first, as to the power of Congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints ; and, secondly, as to the power of Congress and the courts to seize the property of said corporation and to hold the same for the purposes mentioned in the decree.

“The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than

the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the Territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those Territories. Having rightfully acquired said Territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self evident. . . . Mr. Justice Nelson delivering the opinion of the court in *Benner v. Porter*, 9 How. 235, 242, speaking of the territorial governments established by Congress, says: 'They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities.' Chief Justice Waite, in the case of *National Bank v. County of Yankton*, 101 U. S. 129, 133, said: 'In the organic Act of Dakota there was not an express reservation of power in Congress to amend the Acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void Act of the territorial legislature valid, and a valid Act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.' In a still more recent case, and one relating to the legislation of Congress over the Territory of Utah itself, *Murphy v. Ramsey*, 114 U. S. 15, 44, Mr. Justice Matthews said: 'The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the Act of March 22, 1882, so far as it abridges the rights of electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States as sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the



powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms.' Doubtless Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."<sup>1</sup>

<sup>1</sup> "It would seem, from these various congressional regulations of the Territories belonging to the United States, that Congress have supreme power in the government of them, depending on the exercise of their sound discretion. That discretion has hitherto been exercised in wisdom and good faith, and with an anxious regard for the security of the rights and privileges of the inhabitants, as defined and declared in the ordinance of July, 1787, and in the Constitution of the United States. 'All admit,' said Chief Justice Marshall (4 Wheaton, 422), 'the constitutionality of a territorial government.' But neither the District of Columbia, nor a Territory, is a State, within the meaning of the Constitution, or entitled to claim the privileges secured to the members of the Union. This has been so adjudged by the Supreme Court. *Hepburn v. Ellzey*, 2 Cranch, 445; *Corporation of New Orleans v. Winter*, 1 Wheaton, 91. Nor will a writ of error or appeal lie from a territorial court to the Supreme Court, unless there be a special statute provision for the purpose. *Clarke v. Bazadone*, 1 Cranch, 212; *United States v. More*, 3 *Ib.* 159. If, therefore, the government of the United States should carry into execution the project of colonizing the great valley of the Columbia or Oregon River, to the west of the Rocky Mountains, it would afford a subject of grave consideration, what would be the future civil and political destiny of that country. It would be a long time before it would be populous enough to be created into one or more independent States; and in the mean time, upon the doctrine taught by the Acts of Congress, and even by the judicial decisions of the Supreme Court, the colonists would be in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and Parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever. Such a state of absolute sovereignty on the one hand, and of absolute dependence on the other, is not congenial with the free and independent spirit of our native institutions; and the establishment of distant territorial governments, ruled according to will and pleasure, would have a very natural tendency, as all proconsular governments have had, to abuse and oppression."—1 *Kent's Com.* \*385.

The foregoing passage is found, in substantially the same form, in all the editions of Kent's Commentaries, beginning with the first in 1826.

Compare the doctrine of *U. S. v. Kagama*, 118 U. S. 375 (1886), deciding that the United States has full legislative power over tribal Indians, on reservations in the States as well as the Territories,—and the grounds on which it is put. "These Indians," said MILLER, J., for the court, "are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of

## JONES v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1890.

[137 U. S. 202.]

. . . *Mr. E. J. Waring, Mr. John Henry Keene, Jr., and Mr. Archibald Stirling*, for plaintiffs in error. *Mr. Joseph S. Davis and Mr. J. Edward Stirling* were with them on the brief.

*Mr. Attorney-General*, for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an indictment, found in the District Court of the United States for the District of Maryland, and remitted to the Circuit Court under Rev. Stat. § 1039, alleging that Henry Jones, late of that district, on September 14, 1889, "at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, the same being, at the time of the committing of the offences in the manner and form as hereinafter stated by the persons hereinafter named, an island situated in the Caribbean Sea, and named Navassa Island, and which was then and there recognized and considered by the United States as containing a deposit of guano, within the meaning and terms of the laws of the United States relating to such islands, and which was then and there recognized and considered by the United States as appertaining to the United States, and which was also then and there in the possession of the United States, under the laws of the United States then and there in force relating to such islands," murdered one Thomas N. Foster, by giving him three mortal blows with an axe, of which he there died on the same day; and that

and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else. *Murphy v. Ramsey*, 114 U. S. 15, 44. . . . [It is then laid down that the general government may legislate for tribal Indians on both State and territorial reservations.] They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen. . . . The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

In dealing with the tribal Indians, the United States government has never proceeded on the theory that its action was restrained by the amendments, or by other like clauses in the body of the Federal Constitution. — Ed.

other persons named aided and abetted in the murder. The indictment, after charging the murder in usual form, alleged that the District of Maryland was the District of the United States into which the defendant was afterwards first brought from the Island of Navassa.

The defendant filed a general demurrer, which was overruled, and he then pleaded not guilty. The jury returned a verdict of guilty; and a bill of exceptions was tendered by the defendant, and allowed by the court, in substance as follows: — . . .

After verdict, the defendant moved in arrest of judgment, for various reasons, the only one of which, relied on in argument, was this: "Because the Act of August 18, 1856, c. 164, now codified with amendments as Title 72 of the Revised Statutes of the United States, is unconstitutional and void, and the court was without jurisdiction to try the defendant under the indictment found against him."

The motion was overruled, and the defendant sentenced to death; and he sued out this writ of error under the Act of February 6, 1889, c. 113, § 6; 25 Stat. 656. . . .

By section 6 of the same Act, re-enacted in section 5576 of the Revised Statutes, all acts done, and offences or crimes committed, on any such island, rock, or key, by persons who may land thereon, or in the waters adjacent thereto, "shall be held and deemed to have been done or committed on the high seas, on board a merchant ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels and offences on the high seas; which laws, for the purposes aforesaid, are hereby extended to and over such islands, rocks, or keys."

This section does not (as argued for the defendant) assume to extend the admiralty jurisdiction over land; but, in the exercise of the power of the United States to preserve peace and punish crime in all regions over which they exercise jurisdiction, it unequivocally extends the provisions of the Statutes of the United States for the punishment of offences committed upon the high seas to like offences committed upon guano islands which have been determined by the President to appertain to the United States. In either case, the crime, the punishment, and the procedure are statutory, the whole criminal jurisdiction of the courts of the United States being derived from Acts of Congress. *United States v. Hudson*, 7 Cranch, 32; *United States v. Britton*, 108 U. S. 199, 206.

By the Constitution of the United States, while a crime committed within any State must be tried in that State and in a district previously ascertained by law, yet a crime not committed within any State of the Union may be tried at such place as Congress may by law have directed. Constitution, art. 3, § 2; Amendments, art. 6; *United States v. Dawson*, 15 How. 467, 488. Congress has directed that "the trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." Rev. Stat.

§ 730. And Congress has awarded the punishment of death to the crime of murder, whether committed upon the high seas or other tide-waters out of the jurisdiction of any particular State, or "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States." Rev. Stat. § 5339. Both these Acts of Congress clearly include murder committed on any land within the exclusive jurisdiction of the United States, and not within any judicial district, as well as murder committed on the high seas. *Ex parte Bollman*, 4 Cranch, 75, 136; *United States v. Bevans*, 3 Wheat. 336, 390, 391; *United States v. Arwo*, 19 Wall. 486.

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, c. 18; Wheaton on International Law (8th ed.) §§ 161, 165, 176, note 104; Halleck on International Law, c. 6, §§ 7, 15; 1 Phillimore on International Law (3d ed.) §§ 227, 229, 230, 232, 242; 1 Calvo Droit International (4th ed.) §§ 266, 277, 300; *Whiton v. Albany Ins. Co.*, 109 Mass. 24, 31.

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. . . .

*Judgment affirmed.*

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IN RE ROSS.

SUPREME COURT OF THE UNITED STATES. 1890.

[140 U. S. 453.]

THE petitioner below, the appellant here, was imprisoned in the penitentiary at Albany in the State of New York. He was convicted on the 20th of May, 1880, in the American consular tribunal in Japan, of the crime of murder, committed on board of an American ship in the harbor of Yokohama in that empire, and sentenced to death.

On the 6th of August following, his sentence was commuted by the President to imprisonment for life in the penitentiary at Albany, and to that place he was taken, and there he has ever since been confined. Nearly ten years afterwards, on the 19th of March, 1890, he applied to the Circuit Court of the United States for the Northern District of New York for a writ of *habeas corpus* for his discharge, alleging that his conviction, sentence, and imprisonment were unlawful, and stating the causes thereof and the attendant circumstances. The writ was issued, directed to the superintendent of the penitentiary, who made return that he held the petitioner under the warrant of the President. . . .

To this warrant was annexed a copy of the petitioner's acceptance of the conditional pardon of the President, certified to be correct by the United States consul-general at Japan. . . .

The case was then heard by the Circuit Court, counsel appearing for the petitioner and the assistant United States attorney for the government. . . .

On the 9th of May, 1880, the appellant, John M. Ross, was one of the crew of the American ship *Bullion*, then in the waters of Japan, and lying at anchor in the harbor of Yokohama. On that day, on board of the ship, he assaulted Robert Kelly, its second mate, with a knife, inflicting in his neck a mortal wound, of which in a few minutes afterwards he died on the deck of the ship. Ross was at once arrested by direction of the master of the vessel and placed in irons, and on the same day he was taken ashore and confined in jail at Yokohama. On the following day, May 10, the master filed with the American consul-general at that place, Thomas B. Van Buren, a complaint against Ross, charging him with the murder of the mate. It contained sufficient averments of the offence, was verified by the oath of the master, and to it the consul-general appended his certificate that he had reasonable grounds for believing its contents were true. The complaint described the accused as one "supposed to be a citizen of the United States."

On the 18th of that month an amended complaint was filed by the master of the ship with the consul-general, in which the accused was described as "an American seaman, duly and lawfully enrolled and shipped and doing service as such seaman on board the American ship *Bullion*." The complaint was also amended in some other particulars. . . .

Previously to its being filed the accused appeared with counsel before the consul-general, and the complaint being read to him, he presented an affidavit stating that he was a subject of Great Britain, a native of Prince Edward's Island, a dependency of the British Empire, and had never renounced the rights or liabilities of a British subject or been expatriated from his native allegiance or been naturalized in any other country. Upon this affidavit he contended that the court was without jurisdiction over him, by reason of his being a subject of Great Britain, and he prayed that he be discharged. His contention was termed in the record a demurrer to the complaint.

The court held that as the accused was a seaman on an American vessel, he was subject to its jurisdiction, and overruled the objection. The counsel of the accused then moved that the charge against him be dismissed, on the ground that he could not be held for the offence except upon the presentment or indictment of a grand jury, but this motion was also overruled.

Four associates were drawn, as required by statute and the consular regulations, to sit with the consul-general on the trial of the accused, and, being sworn to answer questions as to their eligibility, the accused stated that he had no questions to ask them on that subject. They were then sworn in to try the cause "in accordance with court regulations." A motion for a jury on the trial was also made and denied. The amended complaint was then substituted in place of the original, to which no objection was interposed, and to it the accused pleaded "not guilty," and asked for the names of the witnesses for the prosecution, which were furnished to him. The witnesses were then sworn and examined, and they established beyond all possible doubt the offence of murder charged against the accused, which was committed under circumstances of great atrocity. The court found him guilty of murder, and he was sentenced to suffer death in such manner and at such time and place as the United States minister should direct. The conviction and sentence were concurred in by the four associates, and were approved by Mr. Bingham, the minister of the United States in Japan. The minister transmitted the record of the case to the Department of State for the consideration of the President, and for commutation of the sentence or pardon of the prisoner, if deemed advisable. The President subsequently directed the issue to the prisoner of a pardon on condition that he be imprisoned at hard labor for the term of his natural life in the penitentiary at Albany, and it was accepted by him on that condition. His sentence was accordingly commuted, and he was removed to the Albany penitentiary.

The Circuit Court, after hearing argument of counsel and full consideration of the subject, made an order on January 21, 1891, denying the motion of the prisoner for his discharge, and remanding him to the penitentiary and the custody of its superintendent. 44 Fed. Rep. 185. From that order the case was brought here on appeal.

*Mr. George W. Kirchwey*, for appellant made the following points.

*Mr. Assistant Attorney-General Parker* for appellee.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The Circuit Court did not refuse to discharge the petitioner upon any independent conclusion as to the validity of the legislation of Congress establishing the consular tribunal in Japan, and the trial of Americans for offences committed within the territory of that country, without the indictment of a grand jury, and without a trial by a petit jury, but placed its decision upon the long and uniform acquiescence by the executive,

administrative, and legislative departments of the government in the validity of the legislation. Nor did the Circuit Court consider whether the status of the petitioner as a citizen of the United States, or as an American within the meaning of the treaty with Japan, could be questioned, while he was a seaman of an American ship, under the protection of the American flag, but simply stated the view taken on that subject by the minister to Japan, the State Department, and the President. Said the court: "During the thirty years since the statutes conferring the judicial powers on ministers and consuls, which have been referred to, were enacted, that jurisdiction has been freely exercised. Citizens of the United States have been tried for serious offences before these officers, without preliminary indictment or a common-law jury, and convicted and punished. These trials have been authorized by the regulations, orders and decrees of ministers, and it must be presumed that the regulations, orders and decrees of ministers prescribing the mode of trial have been transmitted to the Secretary of the State, and by him been laid before Congress for revision, as required by law. Unless the petitioner was not properly subject to this jurisdiction because he was not a citizen of the United States, his trial and sentence were in all respects modal, as well as substantial, regular and valid under the laws of Congress, according to the construction placed upon these statutes by the acquiescence of the executive, administrative, and legislative departments of the government for this long period of time."

Under these circumstances the Circuit Court was of opinion that it ought not to adjudge that the sentence imposed upon the petitioner was utterly unwarranted and void, when the case was one in which his rights could be adequately protected by this court, and when a decision by the Circuit Court setting him at liberty, although it might be reversed, would be practically irrevocable.

The Circuit Court might have found an additional ground for not calling in question the legislation of Congress, in the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries, or to invest their consuls with judicial authority, which is the same thing, for the trial of their own subjects or citizens for offences committed in those countries, as well as for the settlement of civil disputes between them; and in the uniform recognition, down to the time of the formation of our government, of the fact that the establishment of such tribunals was among the most important subjects for treaty stipulations. This recognition of their importance has continued ever since, though the powers of those tribunals are now more carefully defined than formerly. *Dainese v. Hale*, 91 U. S. 13.

The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are

termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offences. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial, secured by the Constitution to citizens of the United States at home, should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when



thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. Letter of Mr. Cushing to Mr. Calhoun of September 29, 1844, accompanying President's message communicating abstract of treaty with China, Senate Doc. 58, 28th Cong. 2d Sess.; Letter on Judicial Exterritorial Rights by Secretary Frelinghuysen to Chairman of Senate Committee on Foreign Relations of April 29, 1882, Senate Doc. 89, 47th Cong. 1st Sess.; Phillimore on Int. Law, vol. 2, part 7; Halleck on Int. Law, c. 41. . . .

The jurisdiction of the consular tribunal, as is thus seen, is to be exercised and enforced in accordance with the laws of the United States; and of course in pursuance of them the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offence he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel; and, indeed, will have the benefit of all the provisions necessary to secure a fair trial before the

consul and his associates. The only complaint of this legislation made by counsel is that, in directing the trial to be had before the consul and associates summoned to sit with him, it does not require a previous presentment or indictment by a grand jury, and does not give to the accused a petit jury. The want of such clauses, as affecting the validity of the legislation, we have already considered. It is not pretended that the prisoner did not have, in other respects, a fair trial in the consular court.

It is further objected to the proceedings in the consular court that the offence with which the petitioner was charged, having been committed on board of a vessel of the United States in Japanese waters, was not triable before the consular court; and that the petitioner, being a subject of Great Britain, was not within the jurisdiction of that court. These objections we will now proceed to consider.

The argument presented in support of the first of these positions is briefly this. Congress has provided for the punishment of murder committed upon the high seas, or any arm or bay of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State; and has provided that the trial of all offences committed upon the high seas, out of the jurisdiction of any particular State, shall be in the district where the offender is found or into which he is first brought. The term "high seas" includes waters on the sea-coast without the boundaries of low-water mark; and the waters of the port of Yokohama constitute, within the meaning of the statute, high seas. Therefore it is contended that, although the ship *Bullion* was at the time lying in those waters, the offence for which the appellant was tried and convicted was committed on the high seas and within the jurisdiction of the domestic tribunals of the United States, and is not punishable elsewhere. In support of this position it is assumed that the jurisdiction of the consular court is limited to offences committed on land, within the territory of Japan, to the exclusion of offences committed on waters within that territory.

There is, as it seem to us, an obvious answer to this argument. The jurisdiction to try offences committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of the consular tribunal to try a similar offence when committed in a port of a foreign country in which that tribunal is established, and the offender is not taken to the United States. There is no law of Congress compelling the master of a vessel to carry or transport him to any home port when he can be turned over to a consular court having jurisdiction of similar offences committed in the foreign country. 7 Opinions Attys. Gen. 722. The provisions conferring jurisdiction in capital cases upon the consuls in Japan, when the offence is committed in that country, are embodied in the Revised Statutes, with the provisions as to the jurisdiction of domestic tribunals over such offences committed on the high seas; and those statutes were re-enacted together, and, as re-enacted, went into operation at the same

time. To both effect must be given in proper cases, where they are applicable. We do not adopt the limitation stated by counsel to the jurisdiction of the consular tribunal, that it extends only to offences committed on land. Neither the treaty nor the Revised Statutes to carry them into effect contain any such limitation. The latter speak of offences committed in the country of Japan — meaning within the territorial jurisdiction of that country — which includes its ports and navigable waters as well as its lands.

The position that the petitioner, being a subject of Great Britain, was not within the jurisdiction of the consular court, is more plausible, but admits, we think, of a sufficient answer. The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship *Bullion*. . . .

It is true that the occasion for consular tribunals in Japan may hereafter be less than at present, as every year that country progresses in civilization and in the assimilation of its system of judicial procedure to that of Christian countries, as well as in the improvement of its penal statutes; but the system of consular tribunals which have a general similarity in their main provisions, is of the highest importance, and their establishment in other than Christian countries, where our people may desire to go in pursuit of commerce, will often be essential for the protection of their persons and property. . . . *Order affirmed.*<sup>1</sup>

<sup>1</sup> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries, the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer, and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Ware v. Hylton*, 3 Dall. 199; *Chirac v. Chirac*, 2 Wheat 259; *Hauenstein v. Lynham*, 100 U. S. 483; 8 Opinions Attys. Gen. 417; *The People v. Gerke*, 5 Cal. 381. — FIELD, J., for the court in *Geoffroy v. Riggs*, 133 U. S. 258, 266.

The case of *Chirac v. Chirac*, 2 Wheat 259 (1817), held that a treaty had done away with the incapacity of alienage imposed by certain State laws. In *U. S. v. Forty-three Gallons of Whiskey*, 93 U. S. 188, 197 (1876), DAVIS, J., for the court, said: "The power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the

FONG YUE TING *v.* UNITED STATES.WONG QUAN *v.* UNITED STATES.LEE JOE *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1893.

[149 U. S. 698.]

THESE were three writs of *habeas corpus*, granted by the Circuit Court of the United States, for the Southern District of New York, upon petitions of Chinese laborers, arrested and held by the marshal of the district for not having certificates of residence, under section 6 of the Act of May 5, 1892, c. 60, which is copied in the margin. . . .

Each petition alleged that the petitioner was arrested and detained without due process of law, and that section 6 of the Act of May 5, 1892, was unconstitutional and void.

In each case, the Circuit Court, after a hearing upon the writ of *habeas corpus* and the return of the marshal, dismissed the writ of *habeas corpus*, and allowed an appeal of the petitioner to this court, and admitted him to bail pending the appeal. All the proceedings, from the arrest to the appeal, took place on May 6.

*Mr. Joseph H. Choate* and *Mr. J. Hubley Ashton*, for appellants.

*Mr. Maxwell Evarts* was on *Mr. Choate's* brief.

*Mr. Solicitor-General*, for appellees.

MR. JUSTICE GRAY, after stating the facts, delivered the opinion of the court.

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities therein referred to.

In the recent case of *Nishimura Ekiu v. United States*, 142 U. S. 651, 659, the court, in sustaining the action of the executive department, putting in force an Act of Congress for the exclusion of aliens, said: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed

disability of the citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them, and give to the alien the full protection conferred by its provisions. If this result can be thus obtained, surely the Federal government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce." — ED.

the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

The same views were more fully expounded in the earlier case of *Chae Chan Ping v. United States*, 130 U. S. 581, in which the validity of a former Act of Congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field, in behalf of the court, it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." 130 U. S. 603, 604.

It was also said, repeating the language of Mr. Justice Bradley in *Knox v. Lee*, 12 Wall. 457, 555: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the State governments." 130 U. S. 605. And it was added: "For local interests the several States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S. 606.

The court then went on to say: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases, its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy. The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." 130 U. S. 606, 607. This statement was supported by many citations from the diplomatic correspondence of successive Secretaries of State, collected in Wharton's International Law Digest, § 206.

The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

This is clearly affirmed in despatches referred to by the court in *Chae Chan Ping's Case*. In 1856, Mr. Marcy wrote: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798." In 1869, Mr. Fish wrote: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." Wharton's International Law Digest, § 206; 130 U. S. 607.

The statements of leading commentators on the law of nations are to the same effect. . . .

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the Act of 1892 is consistent with the Constitution.

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States.

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander-in-chief of the army and navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And the several States are expressly forbidden to enter into any treaty, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In exercising the great power which the people of the United States, by establishing a written constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the Acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government. . . .

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by Act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

In *Nishimura Ekiu's Case*, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. 142 U. S. 660.

The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. . . .

In our jurisprudence, it is well settled that the provisions of an Act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty. As was said by this court in *Chae Chan Ping's Case*, following previous decisions: "The treaties were of no greater legal obligation than the Act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative Act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control." "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such Acts as Congress may pass for its enforcement, modification, or repeal." 130 U. S. 600. See also *Foster v. Neilson*, 2 Pet. 253, 314; *Edye v. Robertson*, 112 U. S. 580, 597-599; *Whitney v. Robertson*, 124 U. S. 190.

By the supplementary Act of October 1, 1888, c. 1064, it was enacted, in section 1, that "from and after the passage of this Act, it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed or shall depart therefrom, and shall not have returned before the passage of this Act, to return to, or remain in, the United States;" and in section 2, that "no certificates of identity, provided for in the fourth and fifth sections of the Act to which this is a supplement, shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States." 25 Stat. 504. . . .

By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws, and may



invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. Vattel, lib. 1, c. 19, § 213; 1 Phillimore, c. 18, § 321; Mr. Marcy, in *Kosztka's Case*, Wharton's International Law Digest, § 198. See also *Lau Ow Baw v. United States*, 144 U. S. 47, 62; Merlin, Repertoire de Jurisprudence, Domicile, § 13, quoted in the case, above cited, of *In re Adam*, 1 Moore, P. C. 460, 472, 473.

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest. . . .

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject. . . . In each of these cases the judgment of the Circuit Court, dismissing the writ of *habeas corpus*, is right and must be *Affirmed*.

[BREWER, J., and FULLER, C. J., dissented.]

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#### NOTE.

THE scope of the judicial power of the United States is seen by the Constitution, Art. 3, s. 2, and Art. 6, cl. 2. But not all this power has ever been conferred upon the courts. Kent (Com. i. \*314, 12th ed.) says: "The disposal of the judicial power, except in a few specified cases, belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the Federal courts to every subject which the Constitution might warrant. . . . A considerable portion of the judicial power, placed at the disposal of Congress by the Constitution, has been intentionally permitted to lie dormant, by not being called into action by law."

The student should acquaint himself with certain leading points as to the jurisdiction of the courts of the United States; *e. g.* those which appear in Rev. St. U. S. ss. 639, 641, 687, 691-693 incl., 697, 699, 702, 705, 707, 709, and in the Appellate Courts Act, 26 U. S. Stat. at Large, 826. References to later statutes may be found in Gould and Tucker's Notes on the Rev. Stats. See also Curtis, Jurisdiction U. S. Courts, *passim*, and Foster's Federal Practice. — ED.



## APPENDIX TO PART I.

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### A CONSTITUTION OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS.<sup>1</sup>

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#### PREAMBLE.

THE end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish the following *Declaration of Rights, and Frame of Government*, as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS.

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#### PART THE FIRST.

##### *A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts.*

ARTICLE I. All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

II. It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

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<sup>1</sup> Printed from the official edition of Massachusetts Acts and Resolves for 1893. This instrument went into operation in October, 1780. See *ante*, 54-55, 215, and 220. — ED.

III.<sup>1</sup> [As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of God, and of public instructions in piety, religion, and morality: Therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this Commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily.

And the people of this Commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided, notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive right of electing their public teachers, and of contracting with them for their support and maintenance.

And all moneys paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law].

IV. The people of this Commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent State; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America, in Congress assembled.

V. All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

VI. No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.

VII. Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.

VIII. In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments.

<sup>1</sup> Amendment, Article XI. substituted for this.

IX. All elections ought to be free ; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection ; to give his personal service, or an equivalent, when necessary ; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

XI. Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it ; completely, and without any denial ; promptly, and without delay ; conformably to the laws.

XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially, and formally, described to him ; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him ; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

XIII. In criminal prosecutions, the verification of facts, in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen.

XIV. Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure : and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

XV. In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury ; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

XVI. The liberty of the press is essential to the security of freedom in a State : it ought not, therefore, to be restrained in this Commonwealth.

XVII. The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature ; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

XVIII. A frequent recurrence to the fundamental principles of the Constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives : and

they have a right to require of their lawgivers and magistrates an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the Commonwealth.

XIX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

XX. The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.

XXI. The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

XXII. The legislature ought frequently to assemble for the redress of grievances, for correcting, strengthening, and confirming the laws, and for making new laws, as the common good may require.

XXIII. No subsidy, charge, tax, impost, or duties ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives in the legislature.

XXIV. Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

XXV. No subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature.

XXVI. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

XXVII. In time of peace, no soldier ought to be quartered in any house without the consent of the owner; and in time of war, such quarters ought not be made but by the civil magistrate, in a manner ordained by the legislature.

XXVIII. No person can in any case be subject to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature.

XXIX. It is essential to the preservation of the rights of every individual, his life, liberty, property, and character that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

XXX. In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.<sup>1</sup>

<sup>1</sup> "It is plain that where the law is made by one man there it may be unmade by one man; so that the man is not governed by the law, but the law by the man, which amounts to the government of the man, and not of the law. Whereas the law being not to be made but by the many, no man is governed by another man, but by that only which is the common interest; by which means this amounts to a government of laws and not of men."—JAMES HARRINGTON, *The Art of Lawgiving*, Preface; *OCEANA and Other Works*, 3d ed. 386.

"Sir," said Rufus Choate, in the Massachusetts Convention of 1853, for revising the Constitution of the State (1 Debates, 120), "that same Bill of Rights, which so solicitously separates executive, judicial, and legislative powers from each other, 'to the end,'—in the fine and noble expression of Harrington, borrowed from the 'ancient

## PART THE SECOND.

*The Frame of Government.*

The people, inhabiting the territory formerly called the Province of Massachusetts Bay, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign, and independent body politic, or State, by the name of THE COMMONWEALTH OF MASSACHUSETTS.

## CHAPTER I.

## THE LEGISLATIVE POWER.

## SECTION I.

*The General Court.*

ARTICLE I. The department of legislation shall be formed by two branches, a Senate and House of Representatives; each of which shall have a negative on the other.

The legislative body shall assemble every year [on the last Wednesday in May, and at such other times as they shall judge necessary; and shall dissolve and be dissolved on the day next preceding the said last Wednesday in May;]<sup>1</sup> and shall be styled, THE GENERAL COURT OF MASSACHUSETTS.

II. No bill or resolve of the Senate or House of Representatives shall become a law, and have force as such, until it shall have been laid before the Governor for his revision; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the Senate or House of Representatives, in whichsoever the same shall have originated; who shall enter the objections sent down by the Governor, at large, on their records, and proceed to reconsider the said bill or resolve. But if after such reconsideration, two-thirds of the said Senate or House of Representatives, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall have the force of a law: but in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the persons voting for, or against, the said bill or resolve, shall be entered upon the public records of the Commonwealth.

And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the Governor within five days after it shall have been presented, the same shall have the force of a law.

III. The General Court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be held in the name of the Commonwealth, for the hearing, trying, and determining of all manner of crimes, offences, pleas, processes, complaints, actions, matters, causes, and things, whatsoever, arising or happening within the Commonwealth, or between or concerning persons

prudence,' one of those historical phrases of the old glorious school of liberty of which this Bill of Rights is so full, — and which phrases I entreat the good taste of my accomplished friends in my eye, to whom it is committed, to spare in their very rust, as they would spare the general English of the Bible, — 'to the end it may be a government of laws, and not of men;' that same Bill of Rights separates the people, with the same solicitude, and for the same reason, from every part of their actual government, — 'to the end it may be a government of laws and not of men.' — Ed.

<sup>1</sup> For change of time, etc., see Amendments, Art. X.

inhabiting, or residing, or brought within the same : whether the same be criminal or civil, or whether the said crimes be capital or not capital, and whether the said pleas be real, personal, or mixed ; and for the awarding and making out of execution there upon. To which courts and judicatories are hereby given and granted full power and authority, from time to time, to administer oaths or affirmations, for the better discovery of truth in any matter in controversy or depending before them.

IV. And further, full power and authority are hereby given and granted to the said General Court, from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions, either with penalties or without ; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof ;<sup>1</sup> and to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said Commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for ; and to set forth the several duties, powers, and limits, of the several civil and military officers of this Commonwealth, and the forms of such oaths or affirmations as shall be respectively administered unto them for the execution of their several offices and places, so as the same be not repugnant or contrary to this Constitution ; and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth ; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same ; to be issued and disposed of by warrant, under the hand of the Governor of this Commonwealth for the time being, with the advice and consent of the Council, for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof, according to such acts as are or shall be in force within the same.

And while the public charges of government, or any part thereof, shall be assessed on polls and estates, in the manner that has hitherto been practised, in order that such assessments may be made with equality, there shall be a valuation of estates within the Commonwealth, taken anew once in every ten years at least, and as much oftener as the General Court shall order.

## CHAPTER I.

### SECTION II.

#### *Senate.*

ARTICLE I.<sup>2</sup> [There shall be annually elected, by the freeholders and other inhabitants of this Commonwealth, qualified as in this Constitution is provided, forty persons

<sup>1</sup> These words (and indeed the same is true of the whole of §§ III. and IV.), are taken from the Provincial Charter of 1691 (1 Poore's Charters, 951), with only such variations as are needed to adapt them to the new purposes : . . . "And we do further . . . give and grant to the said governor and the great and general court or assembly . . . full power and authority from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions, either with penalties or without (so as the same be not repugnant or contrary to the laws of this our realm of England) as they shall judge to be for the good and welfare of our said province or territory, and for the government and ordering thereof and of the people inhabiting or who shall inhabit the same, and for the necessary support and defence of the government thereof." — ED.

<sup>2</sup> Superseded by Amendments, Art. XIII., which was also superseded by Amendments, Art. XXII. For provision as to councillors, see Amendments, Art. XVI.



to be councillors and senators for the year ensuing their election ; to be chosen by the inhabitants of the districts into which the Commonwealth may, from time to time, be divided by the General Court for that purpose : and the General Court, in assigning the numbers to be elected by the respective districts, shall govern themselves by the proportion of the public taxes paid by the said districts ; and timely make known to the inhabitants of the Commonwealth the limits of each district, and the number of councillors and senators to be chosen therein ; provided that the number of such districts shall never be less than thirteen ; and that no district be so large as to entitle the same to choose more than six senators.

And the several counties in this Commonwealth shall, until the General Court shall determine it necessary to alter the said districts, be districts for the choice of councillors and senators (except that the counties of Dukes County and Nantucket shall form one district for that purpose) and shall elect the following number for councillors and senators, viz. : Suffolk, six ; Essex, six ; Middlesex, five ; Hampshire, four ; Plymouth, three ; Barnstable, one ; Bristol, three ; York, two ; Dukes County and Nantucket, one ; Worcester, five ; Cumberland, one ; Lincoln, one ; Berkshire, two.]

II. The Senate shall be the first branch of the legislature ; and the senators shall be chosen in the following manner, viz. : there shall be a meeting on the [first Monday in April],<sup>1</sup> annually, forever, of the inhabitants of each town in the several counties of this Commonwealth ; to be called by the selectmen, and warned in due course of law, at least seven days before the [first Monday in April], for the purpose of electing persons to be senators and councillors ; [and at such meetings every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the Commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to give in his vote for the senators for the district of which he is an inhabitant].<sup>2</sup> And to remove all doubts concerning the meaning of the word "inhabitant" in this Constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this State, in that town, district, or plantation where he dwelleth, or hath his home.

The selectmen of the several towns shall preside at such meetings impartially ; and shall receive the votes of all the inhabitants of such towns present and qualified to vote for senators, and shall sort and count them in open town meeting, and in presence of the town clerk, who shall make a fair record, in presence of the selectmen, and in open town meeting, of the name of every person voted for, and of the number of votes against his name : and a fair copy of this record shall be attested by the selectmen and the town clerk, and shall be sealed up, directed to the Secretary of the Commonwealth for the time being, with a superscription, expressing the purport of the contents thereof, and delivered by the town clerk of such towns, to the sheriff of the county in which such town lies, thirty days at least before [the last Wednesday in May]<sup>3</sup> annually ; or it shall be delivered into the secretary's office seventeen days at least before the said [last Wednesday in May] : and the sheriff of each county shall deliver all such certificates by him received, into the secretary's office, seventeen days before the said [last Wednesday in May].

And the inhabitants of plantations unincorporated, qualified as this Constitution provides, who are or shall be empowered and required to assess taxes upon themselves toward the support of government, shall have the same privilege of voting for councillors and senators in the plantations where they reside, as town inhabitants have in their respective towns ; and the plantation meetings for that purpose shall be held annually [on the same first Monday in April],<sup>4</sup> at such place in the plantations, respectively, as the assessors thereof shall direct ; which assessors shall have like authority for notifying the electors, collecting and returning the votes, as the selectmen and town clerks have in their several towns, by this Constitution. And all other persons living in places un-

<sup>1</sup> See Amendments, Arts. X. and XV. As to cities, see Amendments, Art. II.

<sup>2</sup> Superseded by Amendments, Arts. III., XX., XXVIII., XXX., XXXI., and XXXII.

<sup>3</sup> Time changed to first Wednesday of January. See Amendments, Art. X.

<sup>4</sup> Time of election changed by Amendments, Art. XV.

incorporated (qualified as aforesaid) who shall be assessed to the support of government by the assessors of an adjacent town, shall have the privilege of giving in their votes for councillors and senators in the town where they shall be assessed, and be notified of the place of meeting by the selectmen of the town where they shall be assessed, for that purpose, accordingly.

III. And that there may be a due convention of senators on the [last Wednesday in May]<sup>1</sup> annually, the Governor with five of the Council, for the time being, shall, as soon as may be, examine the returned copies of such records; and fourteen days before the said day he shall issue his summons to such persons as shall appear to be chosen by [a majority of]<sup>2</sup> voters, to attend on that day, and take their seats accordingly: provided, nevertheless, that for the first year the said returned copies shall be examined by the president and five of the council of the former constitution of government; and the said president shall, in like manner, issue his summons to the persons so elected, that they may take their seats as aforesaid.

IV. The Senate shall be the final judge of the elections, returns, and qualifications of their own members, as pointed out in the Constitution; and shall [on the said last Wednesday in May]<sup>3</sup> annually, determine and declare who are elected by each district to be senators [by a majority of votes; and in case there shall not appear to be the full number of senators returned elected by a majority of votes for any district, the deficiency shall be supplied in the following manner, viz.: The members of the House of Representatives, and such senators as shall be declared elected, shall take the names of such persons as shall be found to have the highest number of votes in such district, and not elected, amounting to twice the number of senators wanting, if there be so many voted for; and out of these shall elect by ballot a number of senators sufficient to fill up the vacancies in such district; and in this manner all such vacancies shall be filled up in every district of the Commonwealth; and in like manner all vacancies in the senate, arising by death, removal out of the State, or otherwise, shall be supplied as soon as may be, after such vacancies shall happen].<sup>4</sup>

V. Provided, nevertheless, that no person shall be capable of being elected as a senator [who is not seised in his own right of a freehold, within this Commonwealth, of the value of three hundred pounds at least, or possessed of personal estate to the value of six hundred pounds at least, or of both to the amount of the same sum, and]<sup>5</sup> who has not been an inhabitant of this Commonwealth for the space of five years immediately preceding his election, and, at the time of his election, he shall be an inhabitant in the district for which he shall be chosen.

VI. The Senate shall have power to adjourn themselves, provided such adjournments do not exceed two days at a time.

VII. The Senate shall choose its own president, appoint its own officers, and determine its own rules of proceedings.

VIII. The Senate shall be a court with full authority to hear and determine all impeachments made by the House of Representatives, against any officer or officers of the Commonwealth, for misconduct and mal-administration in their offices. But previous to the trial of every impeachment the members of the Senate shall respectively be sworn, truly and impartially to try and determine the charge in question, according to evidence. Their judgment, however, shall not extend further than to removal from office and disqualification to hold or enjoy any place of honor, trust or profit, under this Commonwealth; but the party so convicted shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land.

IX. [Not less than sixteen members of the Senate shall constitute a quorum for doing business].<sup>6</sup>

<sup>1</sup> Time changed to first Wednesday in January by Amendments, Art. X.

<sup>2</sup> Majority changed to plurality by Amendments, Art. XIV.

<sup>3</sup> Time changed to first Wednesday of January by Amendments, Art. X.

<sup>4</sup> Majority changed to plurality by Amendments, Art. XIV. Changed to election by people. See Amendments, Art. XXIV.

<sup>5</sup> Property qualification abolished. See Amendments, Art. XIII.

<sup>6</sup> See Amendments, Arts. XXII and XXXIII.

## CHAPTER I.

## SECTION III.

*House of Representatives.*

ARTICLE I. There shall be, in the legislature of this Commonwealth, a representation of the people, annually elected, and founded upon the principle of equality.

II. [And in order to provide for a representation of the citizens of this Commonwealth, founded upon the principle of equality, every corporate town containing one hundred and fifty ratable polls may elect one representative; every corporate town containing three hundred and seventy-five ratable polls may elect two representatives; every corporate town containing six hundred ratable polls may elect three representatives; and proceeding in that manner, making two hundred and twenty-five ratable polls the mean increasing number for every additional representative.

Provided, nevertheless, that each town now incorporated, not having one hundred and fifty ratable polls, may elect one representative; but no place shall hereafter be incorporated with the privilege of electing a representative, unless there are within the same one hundred and fifty ratable polls.]<sup>1</sup>

And the House of Representatives shall have power from time to time to impose fines upon such towns as shall neglect to choose and return members to the same, agreeably to this Constitution.

The expenses of travelling to the General Assembly, and returning home, once in every session, and no more, shall be paid by the government, out of the public treasury, to every member who shall attend as seasonably as he can, in the judgment of the house, and does not depart without leave.

III. Every member of the House of Representatives shall be chosen by written votes; [and, for one year at least next preceding his election, shall have been an inhabitant of, and have been seised in his own right of a freehold of the value of one hundred pounds within the town he shall be chosen to represent, or any ratable estate to the value of two hundred pounds; and he shall cease to represent the said town immediately on his ceasing to be qualified as aforesaid].<sup>2</sup>

IV. [Every male person, being twenty-one years of age, and resident in any particular town in this Commonwealth for the space of one year next preceding, having a freehold estate within the said town of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to vote in the choice of a representative or representatives for the said town].<sup>3</sup>

V. [The members of the House of Representatives shall be chosen annually in the month of May, ten days at least before the last Wednesday of that month].<sup>4</sup>

VI. The House of Representatives shall be the grand inquest of this Commonwealth; and all impeachments made by them shall be heard and tried by the Senate.

VII. All money bills shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

VIII. The House of Representatives shall have power to adjourn themselves; provided such adjournment shall not exceed two days at a time.

IX. [Not less than sixty members of the House of Representatives shall constitute a quorum for doing business].<sup>5</sup>

<sup>1</sup> Superseded by Amendments, Arts. XII. and XIII., which were also superseded by Amendments, Art. XXI. 7 Mass. 523.

<sup>2</sup> New provision as to residence. See Amendments, Art. XXI. Property qualifications abolished by Amendments, Art. XIII.

<sup>3</sup> These provisions superseded by Amendments, Arts III., XX., XXVIII., XXX., XXXI., and XXXII. See also Amendments, Art. XXIII., which was annulled by Art. XXVI.

<sup>4</sup> Time of election changed by Amendments, Art. X., and changed again by Amendments, Art. XV.

<sup>5</sup> See Amendments, Arts. XXI. and XXXIII.

X. The House of Representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the Constitution; shall choose their own speaker; appoint their own officers, and settle the rules and orders of proceeding in their own house. They shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence; or who, in the town where the General Court is sitting, and during the time of its sitting, shall threaten harm to the body or estate of any of its members, for any thing said or done in the house; or who shall assault any of them therefor; or who shall assault, or arrest, any witness, or other person, ordered to attend the house, in his way in going or returning; or who shall rescue any person arrested by the order of the house.

And no member of the House of Representatives shall be arrested, or held to bail on mean process, during his going unto, returning from, or his attending the General Assembly.

XI. The Senate shall have the same powers in the like cases; and the Governor and Council shall have the same authority to punish in like cases: provided, that no imprisonment on the warrant or order of the Governor, Council, Senate, or House of Representatives, for either of the above described offences, be for a term exceeding thirty days.

And the Senate and House of Representatives may try and determine all cases where their rights and privileges are concerned, and which, by the Constitution, they have authority to try and determine, by committees of their own members, or in such other way as they may respectively think best.

## CHAPTER II.

### EXECUTIVE POWER.

#### SECTION I.

##### *Governor.*

ARTICLE I. There shall be a supreme executive magistrate, who shall be styled — THE GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS; and whose title shall be — HIS EXCELLENCY.

II. The Governor shall be chosen annually; and no person shall be eligible to this office, unless, at the time of his election, he shall have been an inhabitant of this Commonwealth for seven years next preceding; [and unless he shall at the same time be seised, in his own right, of a freehold, within the Commonwealth, of the value of one thousand pounds]; [and unless he shall declare himself to be of the Christian religion].<sup>1</sup>

III. Those persons who shall be qualified to vote for senators and representatives within the several towns of this Commonwealth shall, at a meeting to be called for that purpose, on the [first Monday of April]<sup>2</sup> annually, give in their votes for a Governor, to the selectmen, who shall preside at such meetings; and the town clerk, in the presence and with the assistance of the selectmen, shall, in open town meeting, sort and count the votes, and form a list of the persons voted for, with the number of votes for each person against his name; and shall make a fair record of the same in the town books, and a public declaration thereof in the said meeting; and shall, in the presence of the inhabitants, seal up copies of the said list, attested by him and the selectmen, and transmit the same to the sheriff of the county, thirty days at least before the [last Wednesday in May];<sup>3</sup> and the sheriff shall transmit the same to the secretary's

<sup>1</sup> [See Amendments, Arts. VII. and XXIV.]

<sup>2</sup> Time of election changed by Amendments, Art. X., and changed again by Amendments, Art. XV.

<sup>3</sup> Time changed to first Wednesday of January by Amendments, Art. X.

office, seventeen days at least before the said [last Wednesday in May]; or the selectmen may cause returns of the same to be made to the office of the Secretary of the Commonwealth, seventeen days at least before the said day; and the secretary shall lay the same before the Senate and the House of Representatives on the [last Wednesday in May], to be by them examined; and [in case of an election by a majority of all the votes returned],<sup>1</sup> the choice shall be by them declared and published; [but if no person shall have a majority of votes, the House of Representatives shall, by ballot, elect two out of four persons who had the highest number of votes, if so many shall have been voted for; but, if otherwise, out of the number voted for; and make return to the Senate of the two persons so elected; on which the Senate shall proceed, by ballot, to elect one, who shall be declared Governor]

IV. The Governor shall have authority, from time to time, at his discretion, to assemble and call together the councillors of this Commonwealth for the time being; and the Governor with the said councillors, or five of them at least, shall, and may, from time to time, hold and keep a Council, for the ordering and directing the affairs of the Commonwealth, agreeably to the Constitution and the laws of the land.

V. The Governor, with advice of Council, shall have full power and authority, during the session of the General Court, to adjourn or prorogue the same to any time the two houses shall desire; [and to dissolve the same on the day next preceding the last Wednesday in May; and, in the recess of the said court, to prorogue the same from time to time, not exceeding ninety days in any one recess];<sup>2</sup> and to call it together sooner than the time to which it may be adjourned or prorogued, if the welfare of the Commonwealth shall require the same; and in case of any infectious distemper prevailing in the place where the said court is next at any time to convene, or any other cause happening, whereby danger may arise to the health or lives of the members from their attendance, he may direct the session to be held at some other, the most convenient place within the State.

[And the Governor shall dissolve the said General Court on the day next preceding the last Wednesday in May.]<sup>3</sup>

VI. In cases of disagreements between the two Houses, with regard to the necessity, expediency, or time of adjournment or prorogation, the Governor, with advice of the Council, shall have a right to adjourn or prorogue the General Court, not exceeding ninety days, as he shall determine the public good shall require.

VII. The Governor of this Commonwealth, for the time being, shall be the commander-in-chief of the army and navy, and of all the military forces of the State, by sea and land; and shall have full power, by himself, or by any commander, or other officer or officers, from time to time, to train, instruct, exercise, and govern the militia and navy; and, for the special defence and safety of the Commonwealth, to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them to encounter, repel, resist, expel, and pursue, by force of arms, as well by sea as by land, within or without the limits of this Commonwealth, and also to kill, slay, and destroy, if necessary, and conquer, by all fitting ways, enterprises, and means whatsoever, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprise the destruction, invasion, detriment, or annoyance of this Commonwealth; and to use and exercise over the army and navy, and over the militia in actual service, the law-martial, in time of war or invasion, and also in time of rebellion, declared by the legislature to exist, as occasion shall necessarily require; and to take and surprise, by all ways and means whatsoever, all and every such person or persons, with their ships, arms, ammunition, and other goods, as shall, in a hostile manner, invade, or attempt the invading, conquering, or annoying this Commonwealth; and that the Governor be intrusted with all these and other powers, incident to the offices of captain-general and commander-in-chief, and admiral, to be exercised agreeably to the rules and regulations of the Constitution, and the laws of the land, and not otherwise.

<sup>1</sup> Changed to plurality by Amendments, Art. XIV.

<sup>2</sup> As to dissolution, see Amendments, Art. X.

<sup>3</sup> As to dissolution, see Amendments, Art. X.

Provided, that the said Governor shall not, at any time hereafter, by virtue of any power by this Constitution granted, or hereafter to be granted to him by the legislature, transport any of the inhabitants of this Commonwealth, or oblige them to march out of the limits of the same, without their free and voluntary consent, or the consent of the General Court; except so far as may be necessary to march or transport them by land or water, for the defence of such part of the State to which they cannot otherwise conveniently have access.

VIII. The power of pardoning offences, except such as persons may be convicted of before the Senate by an impeachment of the house, shall be in the Governor, by and with the advice of Council; but no charter of pardon, granted by the Governor, with advice of the Council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned.

IX. All judicial officers [the attorney-general], the solicitor-general [all sheriffs], coroners [and registers of probate],<sup>1</sup> shall be nominated and appointed by the Governor, by and with the advice and consent of the Council; and every such nomination shall be made by the Governor, and made at least seven days prior to such appointment.

X. The captains and subalterns of the militia shall be elected by the written votes of the train-band and alarm lists of their respective companies [of twenty-one years of age and upwards];<sup>2</sup> the field officers of regiments shall be elected by the written votes of the captains and subalterns of their respective regiments; the brigadiers shall be elected, in like manner, by the field officers of their respective brigades; and such officers, so elected, shall be commissioned by the Governor, who shall determine their rank.

The legislature shall, by standing laws, direct the time and manner of convening the electors, and of collecting votes, and of certifying to the Governor the officers elected.

The major-generals shall be appointed by the Senate and House of Representatives, each having a negative upon the other; and be commissioned by the Governor.

And if the electors of brigadiers, field officers, captains, or subalterns, shall neglect or refuse to make such elections, after being duly notified, according to the laws for the time being, then the Governor, with advice of Council, shall appoint suitable persons to fill such offices.

[And no officer, duly commissioned to command in the militia, shall be removed from his office, but by the address of both Houses to the Governor, or by fair trial in court-martial, pursuant to the laws of the Commonwealth for the time being.]<sup>3</sup>

The commanding officers of regiments shall appoint their adjutants and quartermasters; the brigadiers their brigade-majors; and the major-generals their aids; and the Governor shall appoint the adjutant-general.

The Governor, with advice of Council, shall appoint all officers of the continental army, whom by the confederation of the United States it is provided that this Commonwealth shall appoint, as also all officers of forts and garrisons.

The divisions of the militia into brigades, regiments, and companies, made in pursuance of the militia laws now in force, shall be considered as the proper divisions of the militia of this Commonwealth, until the same shall be altered in pursuance of some future law.

XI. No moneys shall be issued out of the treasury of this Commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the Governor for the time being, with the advice and consent of the Council, for the necessary defence and support of the Commonwealth; and for the

<sup>1</sup> For provisions as to election of Attorney-General, see Amendments, Art. XVII. For provision as to election of Sheriffs, Registers of Probate, etc., see Amendments, Art. XIX. For provision as to appointment of Notaries Public, see Amendments, Art. IV.

<sup>2</sup> Limitation of age struck out by Amendments, Art. V.

<sup>3</sup> Superseded by Amendments, Art. IV.

protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the General Court.

XII. All public boards, the commissary-general, all superintending officers of public magazines and stores, belonging to this Commonwealth, and all commanding officers of forts and garrisons within the same, shall once in every three months, officially, and without requisition, and at other times, when required by the Governor, deliver to him an account of all goods, stores, provisions, ammunition, cannon with their appendages, and small arms with their accoutrements, and of all other public property whatever under their care respectively; distinguishing the quantity, number, quality, and kind of each, as particularly as may be; together with the condition of such forts and garrisons; and the said commanding officer shall exhibit to the Governor, when required by him, true and exact plans of such forts, and of the land and sea or harbor or harbors, adjacent.

And the said boards, and all public officers, shall communicate to the Governor, as soon as may be after receiving the same, all letters, despatches, and intelligences of a public nature, which shall be directed to them respectively.

XIII. As the public good requires that the Governor should not be under the undue influence of any of the members of the General Court by a dependence on them for his support, that he should in all cases act with freedom for the benefit of the public, that he should not have his attention necessarily diverted from that object to his private concerns, and that he should maintain the dignity of the Commonwealth in the character of its chief magistrate, it is necessary that he should have an honorable stated salary of a fixed and permanent value, amply sufficient for those purposes, and established by standing laws: and it shall be among the first acts of the General Court, after the commencement of this Constitution, to establish such salary by law accordingly.

Permanent and honorable salaries shall also be established by law for the justices of the Supreme Judicial Bench.

And if it shall be found that any of the salaries aforesaid, so established, are insufficient, they shall, from time to time, be enlarged, as the General Court shall judge proper.

## CHAPTER II.

### SECTION II.

#### *Lieutenant-Governor.*

ARTICLE I. There shall be annually elected a lieutenant-governor of the Commonwealth of Massachusetts, whose title shall be — HIS HONOR; and who shall be qualified, in point of [religion],<sup>1</sup> property, and residence in the Commonwealth, in the same manner with the Governor; and the day and manner of his election, and the qualifications of the electors, shall be the same as are required in the election of a Governor. The return of the votes for this officer, and the declaration of his election, shall be in the same manner; [and if no one person shall be found to have a majority of all the votes returned, the vacancy shall be filled by the Senate and House of Representatives, in the same manner as the Governor is to be elected, in case no one person shall have a majority of the votes of the people to be Governor.]<sup>2</sup>

II. The Governor, and in his absence the Lieutenant-Governor, shall be president of the Council, but shall have no vote in council, and the Lieutenant-Governor shall always be a member of the Council, except when the chair of the Governor shall be vacant.

III. Whenever the chair of the Governor shall be vacant, by reason of his death, or absence from the Commonwealth, or otherwise, the Lieutenant-Governor, for the time being, shall, during such vacancy, perform all the duties incumbent upon the Governor, and shall have and exercise all the powers and authorities, which by this Constitution the Governor is vested with, when personally present.

<sup>1</sup> See Amendments, Arts. VII and XXXIV.

<sup>2</sup> Election by plurality provided for by Amendments, Art. XIV.

## CHAPTER II.

## SECTION III.

*Council, and the Manner of Settling Elections by the Legislature.*

ARTICLE I. There shall be a Council for advising the Governor in the executive part of the government, to consist of [nine]<sup>1</sup> persons besides the Lieutenant-Governor, whom the Governor, for the time being, shall have full power and authority from time to time at his discretion to assemble and call together; and the Governor, with the said councillors, or five of them at least, shall and may, from time to time, hold and keep a Council, for the ordering and directing the affairs of the Commonwealth, according to the laws of the land.

II. [Nine councillors shall be annually chosen from among the persons returned for councillors and senators, on the last Wednesday in May, by the joint ballot of the senators and representatives assembled in one room; and in case there shall not be found upon the first choice, the whole number of nine persons who will accept a seat in the Council, the deficiency shall be made up by the electors aforesaid from among the people at large; and the number of senators left shall constitute the Senate for the year. The seats of the persons thus elected from the Senate, and accepting the trust, shall be vacated in the Senate.]<sup>2</sup>

III. The councillors, in the civil arrangements of the Commonwealth, shall have rank next after the Lieutenant-Governor.

IV. [Not more than two councillors shall be chosen out of any one district of this Commonwealth.]<sup>3</sup>

V. The resolutions and advice of the Council shall be recorded in a register, and signed by the members present; and this record may be called for at any time by either house of the legislature; and any member of the Council may insert his opinion, contrary to the resolution of the majority.

VI. Whenever the office of the Governor and Lieutenant-Governor shall be vacant, by reason of death, absence, or otherwise, then the Council, or the major part of them, shall, during such vacancy, have full power and authority to do, and execute, all and every such acts, matters, and things, as the Governor or lieutenant-governor might or could, by virtue of this Constitution, do or execute, if they, or either of them, were personally present.

VII. [And whereas the elections appointed to be made, by this Constitution, on the last Wednesday in May annually, by the two Houses of the legislature, may not be completed on that day, the said elections may be adjourned from day to day until the same shall be completed. And the order of elections shall be as follows: The vacancies in the Senate, if any, shall first be filled up; the Governor and Lieutenant-Governor shall then be elected, provided there should be no choice of them by the people; and afterwards the two Houses shall proceed to the election of the Council.]<sup>4</sup>

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<sup>1</sup> Number of councillors changed to eight. See Amendments, Art. XVI.

<sup>2</sup> Modified by Amendments, Arts. X. and XIII. Superseded by Amendments, Art. XVI.

<sup>3</sup> Superseded by Amendments, Art. XVI.

<sup>4</sup> Superseded by Amendments, Arts. XVI. and XXV.



## CHAPTER II.

## SECTION IV.

*Secretary, Treasurer, Commissary, etc.*

ARTICLE I. [The secretary, treasurer, and receiver-general, and the commissary-general, notaries public, and]<sup>1</sup> naval officers, shall be chosen annually, by joint ballot of the senators and representatives in one room. And, that the citizens of this Commonwealth may be assured, from time to time, that the moneys remaining in the public treasury, upon the settlement and liquidation of the public accounts, are their property, no man shall be eligible as treasurer and receiver-general more than five years successively.

II. The records of the Commonwealth shall be kept in the office of the secretary, who may appoint his deputies, for whose conduct he shall be accountable; and he shall attend the Governor and Council, the Senate and House of Representatives, in person, by his deputies, as they shall respectively require.

## CHAPTER III.

## JUDICIARY POWER.

ARTICLE I. The tenure, that all commission officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this Constitution: provided, nevertheless, the Governor, with consent of the Council, may remove them upon the address of both houses of the legislature.

II. Each branch of the legislature, as well as the Governor and Council, shall have authority to require the opinions of the justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions.

III. In order that the people may not suffer from the long continuance in place of any justice of the peace who shall fail of discharging the important duties of his office with ability or fidelity, all commissions of justices of the peace shall expire and become void, in the term of seven years from their respective dates; and, upon the expiration of any commission, the same may, if necessary, be renewed, or another person appointed, as shall most conduce to the well-being of the Commonwealth.

IV. The judges of probate of wills, and for granting letters of administration, shall hold their courts at such place or places, on fixed days, as the convenience of the people shall require; and the legislature shall, from time to time, hereafter, appoint such times and places; until which appointments, the said courts shall be holden at the times and places which the respective judges shall direct.

V. All causes of marriage, divorce, and alimony, and all appeals from the judges of probate, shall be heard and determined by the Governor and Council, until the legislature shall, by law, make other provision.

## CHAPTER IV.

## DELEGATES TO CONGRESS.

[The delegates of this Commonwealth to the Congress of the United States, shall, some time in the month of June, annually, be elected by the joint ballot of the Senate

<sup>1</sup> For provision as to election of Secretary, Treasurer, and Receiver-General, and Auditor and Attorney-General, see Amendments, Art. XVII.

and House of Representatives, assembled together in one room ; to serve in Congress for one year, to commence on the first Monday in November then next ensuing. They shall have commissions under the hand of the Governor, and the great seal of the Commonwealth ; but may be recalled at any time within the year, and others chosen and commissioned, in the same manner, in their stead.]

## CHAPTER V.

### THE UNIVERSITY AT CAMBRIDGE AND ENCOURAGEMENT OF LITERATURE, ETC.

#### SECTION I.

##### *The University.*

**ARTICLE I.** Whereas our wise and pious ancestors, so early as the year one thousand six hundred and thirty-six, laid the foundation of Harvard College, in which university many persons of great eminence have, by the blessing of God, been initiated in those arts and sciences which qualified them for public employments, both in Church and State ; and whereas the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America, — it is declared, that the **PRESIDENT AND FELLOWS OF HARVARD COLLEGE**, in their corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise, and enjoy, all the powers, authorities, rights, liberties, privileges, immunities, and franchises, which they now have, or are entitled to have, hold, use, exercise, and enjoy ; and the same are hereby ratified and confirmed unto them, the said President and Fellows of Harvard College, and to their successors, and to their officers and servants, respectively, forever.

**II.** And whereas there have been at sundry times, by divers persons, gifts, grants, devises of houses, lands, tenements, goods, chattels, legacies, and conveyances, heretofore made, either to Harvard College in Cambridge, in New England, or to the President and Fellows of Harvard College, or to the said college by some other description, under several charters successively ; it is declared, that all the said gifts, grants, devises, legacies, and conveyances, are hereby forever confirmed unto the President and Fellows of Harvard College, and to their successors in the capacity aforesaid, according to the true intent and meaning of the donor or donors, grantor or grantors, devisor or devisors.

**III.** And whereas, by an Act of the General Court of the colony of Massachusetts Bay, passed in the year one thousand six hundred and forty-two, the Governor and Deputy-Governor, for the time being, and all the magistrates of that jurisdiction, were, with the President, and a number of the clergy in the said Act described, constituted the overseers of Harvard College ; and it being necessary, in this new constitution of government to ascertain who shall be deemed successors to the said Governor, Deputy-Governor, and magistrates ; it is declared, that the Governor, Lieutenant-Governor, council, and senate of this Commonwealth, are, and shall be deemed, their successors, who, with the President of Harvard College, for the time being, together with the ministers of the congregational churches in the towns of Cambridge, Watertown, Charlestown, Boston, Roxbury, and Dorchester, mentioned in the said Act, shall be, and hereby are, vested with all the powers and authority belonging, or in any way appertaining to the overseers of Harvard College ; provided, that nothing herein shall be construed to prevent the legislature of this Commonwealth from making such alterations in the government of the said university, as shall be conducive to its advantage, and the interest of the republic of letters, in as full a manner as might have been done by the legislature of the late Province of the Massachusetts Bay.

## CHAPTER V.

## SECTION II.

*The Encouragement of Literature, etc.*

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good-humor, and all social affections, and generous sentiments, among the people.

## CHAPTER VI.

OATHS AND SUBSCRIPTIONS; INCOMPATIBILITY OF AND EXCLUSION FROM OFFICES; PECUNIARY QUALIFICATIONS; COMMISSIONS; WRITS; CONFIRMATION OF LAWS; HABEAS CORPUS; THE ENACTING STYLE; CONTINUANCE OF OFFICERS; PROVISION FOR A FUTURE REVISAL OF THE CONSTITUTION, ETC.

ARTICLE I. [Any person chosen governor, lieutenant-governor, councillor, senator, or representative, and accepting the trust, shall, before he proceed to execute the duties of his place or office, make and subscribe the following declaration, *viz.* : —

“I, A. B., do declare, that I believe the Christian religion, and have a firm persuasion of its truth; and that I am seised and possessed, in my own right, of the property required by the Constitution, as one qualification for the office or place to which I am elected.”

And the Governor, Lieutenant-Governor, and councillors, shall make and subscribe the said declaration, in the presence of the two Houses of Assembly; and the senators and representatives, first elected under this Constitution, before the President and five of the Council of the former Constitution; and forever afterwards before the Governor and Council for the time being.]<sup>1</sup>

And every person chosen to either of the places or offices aforesaid, as also any person appointed or commissioned to any judicial, executive, military, or other office under the government, shall, before he enters on the discharge of the business of his place or office, take and subscribe the following declaration, and oaths or affirmations, *viz.* : —

“I, A. B., do truly and sincerely acknowledge, profess, testify, and declare, that the Commonwealth of Massachusetts is, and of right ought to be, a free, sovereign, and independent State; and I do swear, that I will bear true faith and allegiance to the said Commonwealth, and that I will defend the same against traitorous conspiracies and all hostile attempts whatsoever; and that I do renounce and abjure all allegiance, subjection, and obedience to the king, queen, or government of Great Britain (as the case may be), and every other foreign power whatsoever; and that no foreign prince, person, prelate, State, or potentate, hath, or ought to have, any jurisdiction, superiority, pre-eminence, authority, dispensing, or other power, in any matter, civil, ecclesiastical, or spiritual, within this Commonwealth, except the authority and power which is or may be vested by their constituents in the Congress of the United States: and I do further

<sup>1</sup> Abolished. See amendments, Art. VII.

testify and declare, that no man or body of men bath or can have any right to absolve or discharge me from the obligation of this oath, declaration, or affirmation; and that I do make this acknowledgment, profession, testimony, declaration, denial, renunciation, and abjuration, heartily and truly, according to the common meaning and acceptation of the foregoing words, without any equivocation, mental evasion, or secret reservation whatsoever. So help me, God.]<sup>1</sup>

"I, A. B., do solemnly swear and affirm, that I will faithfully and impartially discharge and perform all the duties incumbent on me as \_\_\_\_\_, according to the best of my abilities and understanding, agreeably to the rules and regulations of the Constitution and the laws of the Commonwealth. So help me, God."

Provided, always, that when any person chosen or appointed as aforesaid, shall be of the denomination of the people called Quakers, and shall decline taking the said oath[s], he shall make his affirmation in the foregoing form, and subscribe the same, omitting the words [*"I do swear," "and abjure," "oath or," "and abjuration,"* in the first oath, and in the second oath, the words] *"swear and,"* and [in each of them] the words *"So help me, God;"* subjoining instead thereof, *"This I do under the pains and penalties of perjury."*

And the said oaths or affirmations shall be taken and subscribed by the Governor, Lieutenant-Governor, and councillors, before the President of the Senate, in the presence of the two Houses of Assembly; and by the senators and representatives first elected under this Constitution, before the President and five of the Council of the former Constitution; and forever afterwards before the Governor and Council for the time being; and by the residue of the officers aforesaid, before such persons and in such manner as from time to time shall be prescribed by the legislature.

II. No governor, lieutenant-governor, or judge of the Supreme Judicial Court, shall hold any other office or place, under the authority of this Commonwealth, except such as by this Constitution they are admitted to hold, saving that the judges of the said court may hold the offices of justices of the peace through the State; nor shall they hold any other place or office, or receive any pension or salary from any other State or government or power whatever.

No person shall be capable of holding or exercising at the same time, within this State, more than one of the following offices, viz.: Judge of probate — sheriff — register of probate — or register of deeds; and never more than any two offices, which are to be held by appointment of the Governor, or the Governor and Council, or the Senate, or the House of Representatives, or by the election of the people of the State at large, or of the people of any county, military offices, and the offices of justices of the peace excepted, shall be held by one person.

No person holding the office of judge of the Supreme Judicial Court — secretary — attorney-general — solicitor-general — treasurer or receiver-general — judge of probate — commissary-general — [president, professor, or instructor of Harvard College]<sup>2</sup> — sheriff — clerk of the House of Representatives — register of probate — register of deeds — clerk of the Supreme Judicial Court — clerk of the inferior Court of Common Pleas — or officer of the customs, including in this description naval officers — shall at the same time have a seat in the Senate or House of Representatives; but their being chosen or appointed to, and accepting the same, shall operate as a resignation of their seat in the Senate or House of Representatives; and the place so vacated shall be filled up.

And the same rule shall take place in case any judge of the said Supreme Judicial Court, or judge of probate, shall accept a seat in council; or any councillor shall accept of either of those offices or places.

And no person shall ever be admitted to hold a seat in the legislature, or any office of trust or importance under the government of this Commonwealth, who shall, in the due course of law, have been convicted of bribery or corruption in obtaining an election or appointment.

<sup>1</sup> For new oath of allegiance, see amendments, Art. VI.

<sup>2</sup> Officers of Harvard College excepted by Amendments, Art. XXVII.

III. In all cases where sums of money are mentioned in this Constitution, the value thereof shall be computed in silver, at six shillings and eightpence per ounce; and it shall be in the power of the legislature, from time to time, to increase such qualifications, as to property, of the persons to be elected to offices, as the circumstances of the Commonwealth shall require.

IV. All commissions shall be in the name of the Commonwealth of Massachusetts, signed by the Governor and attested by the secretary or his deputy, and have the great seal of the Commonwealth affixed thereto.

V. All writs, issuing out of the clerk's office in any of the courts of law, shall be in the name of the Commonwealth of Massachusetts; they shall be under the seal of the court from whence they issue; they shall bear test of the first justice of the court to which they shall be returnable, who is not a party, and be signed by the clerk of such court.

VI. All the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution.

VII. The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this Commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months.

VIII. The enacting style, in making and passing all Acts, statutes, and laws, shall be — "Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same."

IX. To the end there may be no failure of justice, or danger arise to the Commonwealth from a change of the form of government, all officers, civil and military, holding commissions under the government and people of Massachusetts Bay in New England, and all other officers of the said government and people, at the time this Constitution shall take effect, shall have, hold, use, exercise, and enjoy, all the powers and authority to them granted or committed, until other persons shall be appointed in their stead; and all courts of law shall proceed in the execution of the business of their respective departments; and all the executive and legislative officers, bodies, and powers shall continue in full force, in the enjoyment and exercise of all their trusts, employments, and authority; until the General Court, and the supreme and executive officers under this Constitution, are designated and invested with their respective trusts, powers, and authority.

X. [In order the more effectually to adhere to the principles of the Constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary, the General Court which shall be in the year of our Lord one thousand seven hundred and ninety-five, shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the Constitution, in order to amendments.

And if it shall appear, by the returns made, that two-thirds of the qualified voters throughout the State, who shall assemble and vote in consequence of the said precepts, are in favor of such revision or amendment, the General Court shall issue precepts, or direct them to be issued from the secretary's office, to the several towns to elect delegates to meet in convention for the purpose aforesaid.

The said delegates to be chosen in the same manner and proportion as their representatives in the second branch of the legislature are by this Constitution to be chosen.]<sup>1</sup>

<sup>1</sup> For existing provision as to amendments, see amendments, Art. IX.

[In 1821 nine amendments to this Constitution were proposed by a convention and adopted by the people. Of these, the ninth was as follows: —

ART. IX. If, at any time hereafter, any specific and particular amendment or amend-

XI. This form of government shall be enrolled on parchment, and deposited in the secretary's office, and be a part of the laws of the land; and printed copies thereof shall be prefixed to the book containing the laws of this Commonwealth, in all future editions of the said laws.

### ARTICLES OF CONFEDERATION.

*Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.*

ARTICLE I. The style of this Confederacy shall be, "The United States of America."

ARTICLE II. Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States or either of them. If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State shall flee from justice and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence. Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

ments to the Constitution be proposed in the General Court, and agreed to by a majority of the senators and two-thirds of the members of the House of Representatives present and voting thereon, such proposed amendment or amendments shall be entered on the journals of the two Houses, with the yeas and nays taken thereon, and referred to the General Court then next to be chosen, and shall be published; and if, in the General Court next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of the senators and two-thirds of the members of the House of Representatives present and voting thereon, then it shall be the duty of the General Court to submit such proposed amendment or amendments to the people; and if they shall be approved and ratified by a majority of the qualified voters, voting thereon, at meetings legally warned and holden for that purpose, they shall become part of the Constitution of this Commonwealth.

Under the mode of change thus prescribed, there have been added, down to the end of the year 1893, twenty-five other amendments, making thirty-four in all. See *ante*, 220. — Ed.]

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year. No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States for which he, or another for his benefit, receives any salary, fees, or emolument of any kind. Each State shall maintain its own delegates in any meeting of the States and while they act as members of the committee of the States. In determining questions in the United States in Congress assembled, each State shall have one vote. Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonment during the time of their going to and from, and attendance on, Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign State; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or State, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defence of such State or its trade, nor shall any body of forces be kept up by any State in time of peace, except such number only as, in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use in public stores a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States, in Congress assembled, can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

ARTICLE VII. When land forces are raised by any State for the common defence, all officers of or under the rank of colonel shall be appointed by the legislature of each State respectively by whom such forces shall be raised, or in such manner as

such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence, or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States, in Congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.

ARTICLE IX. The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever; of establishing rules for deciding, in all cases, what captures on land and water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the Acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the Supreme or Superior Court of the State where the cause shall be tried, "well and truly to hear and



determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated, "A Committee of the States," and to consist of one delegate from each State, and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside; provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding; and thereupon the legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled; but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared, and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or

navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each State, on any question, shall be entered on the journal when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal except such parts as are above excepted, to lay before the legislatures of the several States.

ARTICLE X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada, acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

AND WHEREAS it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress to approve of, and to authorize us to ratify, the said Articles of Confederation and perpetual Union, know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual. In witness whereof, we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania, the ninth day of July, in the year of our Lord 1778, and in the third year of the Independence of America.<sup>1</sup>

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<sup>1</sup> Ratified by the last of the States March 1, 1781. — Ed.

## CONSTITUTION OF THE UNITED STATES, WITH THE AMENDMENTS.<sup>1</sup>

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

### ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, [which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.]<sup>2</sup> The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any

<sup>1</sup> Printed, by permission, from an edition by Professors Hart and Channing of Harvard University (published by A. Lovell & Co., New York), of which the editors say: "The text . . . is the result of careful comparison by one of the editors with the original manuscripts, Feb. 10, 11, 1893; and it is intended to be absolutely exact in word, spelling, capitalization, and punctuation." Some of the editors' notes have been omitted, some notes have been added, and certain section-marks inserted by the editors have been dropped. An obvious misprint, "Uember," for "Member" (first line p. 409, *infra*), has been corrected. Otherwise the text above-named is exactly followed. — ED.

<sup>2</sup> Superseded by Fourteenth Amendment.

State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objec-

tions, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress

prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## ARTICLE. II.

SECTION. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall

consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.<sup>1</sup>

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation : —

“ I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

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<sup>1</sup> Superseded by Twelfth Amendment.

## ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State;<sup>1</sup> — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

<sup>1</sup> Limited in its construction by the Eleventh Amendment. (See *Hans v. La.*, ante, p. 295.) — Ed.



The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

#### ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

#### ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

[Note of the draughtsman  
as to interlineations in the  
text of the manuscript.]

Attest

WILLIAM JACKSON  
*Secretary.*

**DONE** in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our names.

Go WASHINGTON—  
*Presidt and deputy from Virginia.*

[Here follow the names of thirty-eight deputies representing twelve States. — Ed.]

ARTICLES in addition to and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.<sup>1</sup>

<sup>1</sup> This heading appears only in the joint resolution submitting the first ten amendments.

## [ARTICLE I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ; or abridging the freedom of speech, or of the press ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## [ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

## [ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## [ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## [ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ; nor shall private property be taken for public use, without just compensation.

## [ARTICLE VI.]

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation ; to be confronted with the witnesses against him ; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## [ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## [ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## [ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## [ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.<sup>1</sup>

## [ARTICLE XI.]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.<sup>2</sup>

## [ARTICLE XII.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.<sup>3</sup>

## ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. SECTION 2. Congress shall have power to enforce this article by appropriate legislation.<sup>4</sup>

<sup>1</sup> The first ten amendments were proposed by Congress September 25, 1789, and declared in force December 15, 1791. — JOHNSTON, *Hist. Am. Politics*. — Ed.

<sup>2</sup> Proposed by Congress March 5, 1794, and declared in force January 8, 1798. — JOHNSTON, *ubi supra*. — Ed.

<sup>3</sup> Proposed by Congress December 12, 1803, and declared in force September 25, 1804. — JOHNSTON, *ubi supra*. — Ed.

<sup>4</sup> Proposed by Congress February 1, 1865, and declared in force December 18, 1865. — JOHNSTON, *ubi supra*. — Ed.

## ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.<sup>1</sup>

## ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. —

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.<sup>2</sup> —

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<sup>1</sup> Proposed by Congress June 16, 1866, and declared in force July 28, 1868. — JOHNSTON, *ubi supra*. — ED.

<sup>2</sup> Proposed by Congress February 26, 1869, and declared in force March 30, 1870. — JOHNSTON, *ubi supra*. — ED.

PASSAGES FROM ALL THE STATE CONSTITUTIONS (OTHER THAN THAT OF MASSACHUSETTS) PRECEDING THE FEDERAL CONSTITUTION.

CONSTITUTION OF NEW HAMPSHIRE. 1776.<sup>1</sup>

*In Congress at Exeter, January 5, 1776.*

VOTED, That this Congress take up CIVIL GOVERNMENT for this colony in manner and form following, viz.

WE, the members of the Congress of New Hampshire, chosen and appointed by the free suffrages of the people of said colony, and authorized and empowered by them to meet together, and use such means and pursue such measures as we should judge best for the public good; and in particular to establish some form of government, provided that measure should be recommended by the Continental Congress: And a recommendation to that purpose having been transmitted to us from the said Congress: Have taken into our serious consideration the unhappy circumstances, into which this colony is involved by means of many grievous and oppressive acts of the British Parliament, depriving us of our natural and constitutional rights and privileges; to enforce obedience to which acts a powerful fleet and army have been sent to this country by the ministry of Great Britain, who have exercised a wanton and cruel abuse of their power, in destroying the lives and properties of the colonists in many places with fire and sword, taking the ships and lading from many of the honest and industrious inhabitants of this colony employed in commerce, agreeable to the laws and customs a long time used here.

The sudden and abrupt departure of his Excellency John Wentworth, Esq., our late Governor, and several of the Council, leaving us destitute of legislation, and no executive courts being open to punish criminal offenders; whereby the lives and properties of the honest people of this colony are liable to the machinations and evil designs of wicked men, *Therefore*, for the preservation of peace and good order, and for the security of the lives and properties of the inhabitants of this colony, we conceive ourselves reduced to the necessity of establishing A FORM OF GOVERNMENT to continue during the present unhappy and unnatural contest with Great Britain; PROTESTING AND DECLARING that we never sought to throw off our dependence upon Great Britain, but felt ourselves happy under her protection, while we could enjoy our constitutional rights and privileges. And that we shall rejoice if such a reconciliation between us and our parent State can be effected as shall be approved by the CONTINENTAL CONGRESS, in whose prudence and wisdom we confide.

Accordingly pursuant to the trust reposed in us, WE DO RESOLVE, that this Congress assume the name, power and authority of a house of Representatives or Assembly for the *Colony of New-Hampshire*. And that said House then proceed to choose twelve persons, being reputable freeholders and inhabitants within this colony, in the following manner, viz. five in the county of Rockingham, two in the county of Strafford, two in the county of Hillsborough, two in the county of Cheshire, and one in the county of Grafton, to be a distinct and separate branch of the Legislature, by the name of a COUNCIL for this colony, to continue as such until the third Wednesday in December next; any seven of whom to be a quorum to do business. That such Council appoint their President, and in his absence that the senior counsellor preside; that a Secretary be appointed by both branches, who may be a counsellor, or otherwise, as they shall choose.

That no act or resolve shall be valid and put into execution unless agreed to, and passed by both branches of the legislature.

That all public officers for the said colony, and each county, for the current year, be

<sup>1</sup> See *ante*, 254. This was the earliest of our constitutions. — ED.

appointed by the Council and Assembly, except the several clerks of the Executive Courts, who shall be appointed by the Justices of the respective Courts.

That all bills, resolves, or votes for raising, levying and collecting money originate in the house of Representatives.

That at any session of the Council and Assembly neither branch shall adjourn from any longer time than from Saturday till the next Monday without consent of the other.

*And it is further resolved*, That if the present unhappy dispute with Great Britain should continue longer than this present year, and the Continental Congress give no instruction or direction to the contrary, the Council be chosen by the people of each respective county in such manner as the Council and house of Representatives shall order.

That general and field officers of the militia, on any vacancy, be appointed by the two houses, and all inferior officers be chosen by the respective companies.

That all officers of the Army be appointed by the two houses, except they should direct otherwise in case of any emergency.

That all civil officers for the colony and for each county be appointed, and the time of their continuance in office be determined by the two houses, except clerks of Courts, and county treasurers, and recorders of deeds.

That a treasurer, and a recorder of deeds for each county be annually chosen by the people of each county respectively; the votes for such officers to be returned to the respective courts of General Sessions of the Peace in the county, there to be ascertained as the Council and Assembly shall hereafter direct.

That precepts in the name of the Council and Assembly, signed by the President of the Council, and Speaker of the house of Representatives, shall issue annually at or before the first day of November, for the choice of a Council and house of Representatives to be returned by the third Wednesday in December then next ensuing, in such manner as the Council and Assembly shall hereafter prescribe. — *2 Poore's Constitutions*, 1279.

## CONSTITUTION OF NEW HAMPSHIRE. 1784.<sup>1</sup>

### PART I. — THE BILL OF RIGHTS.

ARTICLE I. All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

VIII. All power residing originally in, and being derived from the people, all the magistrates and officers of government, are their substitutes and agents, and at all times accountable to them.

XXIX. The power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature, or by authority derived therefrom, to be exercised in such particular cases only as the legislature shall expressly provide for.

XXXV. It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme (or superior) judicial court should hold their offices so long as they behave well; and that they should have honorable salaries, ascertained and established by standing laws.

XXXVII. In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

<sup>1</sup> See *ante*, 214, 215. — Ed.

## PART II. — THE FORM OF GOVERNMENT.

THE people inhabiting the territory formerly called the Province of New-Hampshire, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign, and independent Body-politic, or State, by the name of the STATE OF NEW HAMPSHIRE.

## THE GENERAL COURT.

THE supreme legislative power within this State shall be vested in the senate and house of representatives, each of which shall have a negative on the other.

THE senate and house shall assemble every year on the first Wednesday of June, and at such other times as they may judge necessary; and shall dissolve, and be dissolved, seven days next preceding the said first Wednesday of June; and shall be stiled THE GENERAL COURT OF NEW-HAMPSHIRE.

THE general court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be holden in the name of the State, for the hearing, trying, and determining all manner of crimes, offences, pleas, processes, complaints, actions, causes, matters and things whatsoever, arising, or happening within this state, or between or concerning persons inhabiting or residing, or brought within the same, whether the same be criminal or civil, or whether the crimes be capital or not capital, and whether the said pleas be real, personal, or mixed; and for the awarding and issuing execution thereon. To which courts and judicatories are hereby given and granted full power and authority, from time to time to administer oaths or affirmations, for the better discovery of truth in any matter in controversy, or depending before them.

AND farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant, or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defence of the government thereof. . . .

## SENATE.

THERE shall be annually elected by the freeholders and other inhabitants of this state, qualified as in this constitution is provided, twelve persons to be senators for the year ensuing their election. . . .

The senate shall be a court with full power and authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the state, for misconduct or mal-administration in their offices. But previous to the trial of any such impeachment, the members of the senate shall respectively be sworn, truly and impartially to try and determine the charge in question according to evidence. Their judgment, however, shall not extend farther than removal from office, disqualification to hold or enjoy any place of honor, trust or profit under this state; but the party so convicted, shall nevertheless be liable to indictment, trial, judgment, and punishment, according to laws of the land.

## HOUSE OF REPRESENTATIVES.

THERE shall be in the legislature of this state a representation of the people annually elected and founded upon principles of equality. . . .

## EXECUTIVE POWER. — PRESIDENT.

THERE shall be a supreme executive magistrate, who shall be stiled, THE PRESIDENT OF THE STATE OF NEW-HAMPSHIRE; and whose title shall be HIS EXCELLENCY. . . .

ALL judicial officers . . . shall be nominated and appointed by the president and council; and every such nomination shall be made at least seven days prior to such appointment, and no appointment shall take place, unless three of the council agree thereto. . . .

PERMANENT and honorable salaries shall be established by law for the justices of the superior court. . . .

#### JUDICIARY POWER.

THE tenure, that all commission officers shall have by law in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behaviour, excepting those concerning whom there is a different provision made in this constitution: *Provided nevertheless*, the president, with consent of council, may remove them upon the address of both houses of the legislature.

EACH branch of the legislature, as well as the president and council, shall have authority to require the opinions of the justices of the superior court upon important questions of law, and upon solemn occasions.

IN order that the people may not suffer from the long continuance in place of any justice of the peace, who shall fail in discharging the important duties of his office with ability and fidelity, all commissions of justices of the peace shall become void, at the expiration of five years from their respective dates; and upon the expiration of any commission, the same may, if necessary, be renewed, or another person appointed, as shall most conduce to the well-being of the State. . . .

To preserve an effectual adherence to the principles of the constitution, and to correct any violations thereof, as well as to make such alterations therein, as from experience may be found necessary, the general court shall at the expiration of seven years from the time this constitution shall take effect, issue precepts, or direct them to be issued from the secretary's office, to the several towns and incorporated places, to elect delegates to meet in convention for the purposes aforesaid: the said delegates to be chosen in the same manner, and proportioned as the representatives to the general assembly; provided that no alteration shall be made in this constitution before the same shall be laid before the towns and unincorporated places, and approved by two-thirds of the qualified voters present, and voting upon the question. — 2 *Poore's Constitutions*, 1280.

#### CONSTITUTION OF SOUTH CAROLINA. 1776.<sup>1</sup>

. . . And whereas the judges of courts of law here have refused to exercise their respective functions, so that it is become indispensably necessary that during the present situation of American affairs, and until an accommodation of the unhappy differences between Great Britain and America can be obtained, (an event which, though traduced and treated as rebels, we still earnestly desire,) some mode should be established by common consent, and for the good of the people, the origin and end of all governments, for regulating the internal polity of this colony. The congress being vested with powers competent for the purpose, and having fully deliberated touching the premises, do therefore resolve:

I. That this congress being a full and free representation of the people of this colony, shall henceforth be deemed and called the general assembly of South Carolina, and as such shall continue until the twenty-first day of October next, and no longer.

II. That the general assembly shall, out of their own body, elect by ballot a legislative council, to consist of thirteen members, (seven of whom shall be a quorum,) and to continue for the same time as the general assembly.

III. That the general assembly and the said legislative council shall jointly choose

<sup>1</sup> This constitution was framed by the "provincial congress" of South Carolina, and adopted March 26, 1776. It was not submitted to the people for ratification.



by ballot from among themselves, or from the people at large, a president and commander-in-chief and a vice-president of the colony.

VII. That the legislative authority be vested in the president and commander-in-chief, the general assembly and legislative council. All money-bills for the support of government shall originate in the general assembly, and shall not be altered or amended by the legislative council, but may be rejected by them. All other bills and ordinances may take rise in the general assembly or legislative council, and may be altered, amended, or rejected by either. Bills having passed the general assembly and legislative council may be assented to or rejected by the president and commander-in-chief. Having received his assent, they shall have all the force and validity of an act of general assembly of this colony. And the general assembly and legislative council, respectively, shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly, but the legislative council shall have no power of expelling their own members.

XVI. That the vice-president of the colony and the privy council, or the vice-president and a majority of the privy council for the time being, shall exercise the powers of a court of chancery, and there shall be an ordinary who shall exercise the powers heretofore exercised by that officer in this colony.

XIX. That justices of the peace shall be nominated by the general assembly and commissioned by the president and commander-in-chief, during pleasure. They shall not be entitled to fees except on prosecutions for felony, and not acting in the magistracy, they shall not be entitled to the privileges allowed to them by law.

XX. That all other judicial officers shall be chosen by ballot, jointly by the general assembly and legislative council, and except the judges of the court of chancery, commissioned by the president and commander-in-chief, during good behavior, but shall be removed on address of the general assembly and legislative council.

XXIX. That the resolutions of this or any former congress of this colony, and all laws now of force here, (and not hereby altered,) shall so continue until altered or repealed by the legislature of this colony, unless where they are temporary, in which case they shall expire at the times respectively limited for their duration.

XXX. That the executive authority be vested in the president and commander-in-chief, limited and restrained as aforesaid.

XXXIII. That all persons who shall be chosen and appointed to any office or to any place of trust, before entering upon the execution of office, shall take the following oath: "I, A. B., do swear that I will, to the utmost of my power, support, maintain, and defend the Constitution of South Carolina, as established by Congress on the twenty-sixth day of March, one thousand seven hundred and seventy-six, until an accommodation of the differences between Great Britain and America shall take place, or I shall be released from this oath by the legislative authority of the said colony: So help me God." And all such persons shall also take an oath of office.

XXXIV. That the following yearly salaries be allowed to the public officers undermentioned: The president and commander-in-chief, nine thousand pounds; the chief justice and the assistant judges, the salaries, respectively, as by act of assembly established. . . .—2 *Poore's Constitutions*, 1615.

#### CONSTITUTION OF SOUTH CAROLINA. 1778.<sup>1</sup>

*An act for establishing the constitution of the State of South Carolina.*

II. That the legislative authority be vested in a general assembly, to consist of two distinct bodies, a senate and house of representatives, but that the legislature of this

<sup>1</sup> This constitution was framed by the general assembly of South Carolina, by which it was passed as an "act" March 19, 1778, although it did not go into effect until November, 1778. It was soon afterwards declared by the supreme court of South Carolina that both the constitution of 1776 and the constitution of 1778 were simply acts of the general assembly, which that body could repeal or amend at pleasure. [This constitution was in force till 1790.—Ed.]

State, as established by the constitution or form of government passed the twenty-sixth of March, one thousand seven hundred and seventy-six, shall continue and be in full force until the twenty-ninth day of November ensuing.

III. That as soon as may be after the first meeting of the senate and house of representatives, and at every first meeting of the senate and house of representatives thereafter, to be elected by virtue of this constitution, they shall jointly in the house of representatives choose by ballot from among themselves or from the people at large a governor and commander-in-chief, a lieutenant-governor, both to continue for two years, and a privy council, all of the Protestant religion, and till such choice shall be made the former president or governor and commander-in-chief, and vice-president or lieutenant-governor, as the case may be, and privy council, shall continue to act as such.

[Art. IX. Provides for a privy council.]

XI. That the executive authority be vested in the governor and commander-in-chief, in manner herein mentioned.

XVI. That all money bills for the support of government shall originate in the house of representatives, and shall not be altered or amended by the senate, but may be rejected by them, and that no money be drawn out of the public treasury but by the legislative authority of the State. All other bills and ordinances may take rise in the senate or house of representatives, and be altered, amended, or rejected by either. Acts and ordinances having passed the general assembly shall have the great seal affixed to them by a joint committee of both houses, who shall wait upon the governor to receive and return the seal, and shall then be signed by the president of the senate and speaker of the house of representatives, in the senate-house, and shall thenceforth have all the force and validity of a law, and be lodged in the secretary's office. And the senate and house of representatives, respectively, shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly.

XXIII. That the form of impeaching all officers of the State for mal and corrupt conduct in their respective offices, not amenable to any other jurisdiction, be vested in the house of representatives. But that it shall always be necessary that two-third parts of the members present do consent to and agree in such impeachment. That the senators and such of the judges of this State as are not members of the house of representatives, be a court for the trial of impeachments, under such regulations as the legislature shall establish, and that previous to the trial of every impeachment, the members of the said court shall respectively be sworn truly and impartially to try and determine the charge in question according to evidence, and no judgment of the said court, except judgment of acquittal, shall be valid, unless it shall be assented to by two-third parts of the members then present, and on every trial, as well on impeachments as others, the party accused shall be allowed counsel.

XXIV. That the lieutenant-governor of the State and a majority of the privy council for the time being shall, until otherwise altered by the legislature, exercise the powers of a court of chancery, and there shall be ordinaries appointed in the several districts of this State, to be chosen by the senate and house of representatives jointly by ballot, in the house of representatives, who shall, within their respective districts, exercise the powers heretofore exercised by the ordinary, and until such appointment is made the present ordinary in Charleston shall continue to exercise that office as heretofore.

XXV. That the jurisdiction of the court of admiralty be confined to maritime causes.

XXVI. That justices of the peace shall be nominated by the senate and house of representatives jointly, and commissioned by the governor and commander-in-chief during pleasure. They shall be entitled to receive the fees heretofore established by law; and not acting in the magistracy, they shall not be entitled to the privileges allowed them by law.

XXVII. That all other judicial officers shall be chosen by ballot, jointly by the senate and house of representatives, and, except the judges of the court of chan-

cery, commissioned by the governor and commander-in-chief during good behavior, but shall be removed on address of the senate and house of representatives.

XLIV. That no part of this constitution shall be altered without notice being previously given of ninety days, nor shall any part of the same be changed without the consent of a majority of the members of the senate and house of representatives. — 2 *Poore's Constitutions*, 1620.

#### VIRGINIA BILL OF RIGHTS. 1776.<sup>1</sup>

*A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.*

SEC. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

SEC. 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

SEC. 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised. — 2 *Poore's Constitutions*, 1908.

#### CONSTITUTION OF VIRGINIA. 1776.<sup>2</sup>

The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time; except that the Justices of the County Courts shall be eligible to either House of Assembly.

The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governor, and continue in office during good behaviour. In case of death, incapacity, or resignation, the Governor, with the advice of the Privy Council, shall appoint persons to succeed in office, to be approved or displaced by both Houses. These officers shall have fixed and adequate salaries, and, together with all others, holding lucrative offices, and all ministers of the gospel, of every denomination, be incapable of being elected members of either House of Assembly or the Privy Council.

The Governor, when he is out of office, and others, offending against the State, either by mal-administration, corruption, or other means, by which the safety of the State may be endangered, shall be impeachable by the House of Delegates. Such impeachment to be prosecuted by the Attorney-General, or such other person or persons, as the House may appoint in the General Court, according to the laws of the land. If found guilty, he or they shall be either forever disabled to hold any office under government, or be removed from such office *pro tempore*, or subjected to such pains or penalties as the laws shall direct.

If all or any of the Judges of the General Court should on good grounds (to be

<sup>1</sup> This declaration of rights was framed by a convention, composed of forty-five members of the colonial house of burgesses, which met at Williamsburgh May 6, 1776, and adopted this declaration June 12, 1776.

<sup>2</sup> This constitution was framed by the convention which issued the preceding declaration of rights, and was adopted June 29, 1776. It was not submitted to the people for ratification. [This constitution continued till 1830. — ED.]

judged of by the House of Delegates) be accused of any of the crimes or offences above mentioned, such House of Delegates may, in like manner, impeach the Judge or Judges so accused, to be prosecuted in the Court of Appeals; and he or they, if found guilty, shall be punished in the same manner as is prescribed in the preceding clause. — 2 *Poore's Constitutions*, 1910.

#### CONSTITUTION OF NEW JERSEY. 1776.<sup>1</sup>

I. That the government of this Province shall be vested in a Governor, Legislative Council, and General Assembly.

VII. That the Council and Assembly jointly, at their first meeting after each annual election, shall, by a majority of votes, elect some fit person within the Colony, to be Governor for one year, who shall be constant President of the Council, and have a casting vote in their proceedings; and that the Council themselves shall choose a Vice-President who shall act as such in the absence of the Governor.

VIII. That the Governor, or, in his absence, the Vice-President of the Council, shall have the supreme executive power, be Chancellor of the Colony, and act as captain-general and commander in chief of all the militia, and other military force in this Colony; and that any three or more of the Council shall, at all times, be a privy-council, to consult them; and that the Governor be ordinary or surrogate-general.

IX. That the Governor and Council, (seven whereof shall be a quorum) be the Court of Appeals, in the last resort, in all clauses of law, as heretofore; and that they possess the power of granting pardons to criminals, after condemnation, in all cases of treason, felony, or other offences.

XII. That the Judges of the Supreme Court shall continue in office for seven years: the Judges of the Inferior Court of Common Pleas in the several counties, Justices of the Peace, Clerks of the Supreme Court, Clerks of the Inferior Court of Common Pleas and Quarter Sessions, the Attorney-General, and Provincial Secretary, shall continue in office for five years: and the Provincial Treasurer shall continue in office for one year; and that they shall be severally appointed by the Council and Assembly, in manner aforesaid, and commissioned by the Governor, or, in his absence, the Vice-President of the Council. Provided always, that the said officers, severally, shall be capable of being re-appointed, at the end of the terms severally before limited; and that any of the said officers shall be liable to be dismissed, when adjudged guilty of misbehaviour, by the Council, on an impeachment of the Assembly.

XX. That the legislative department of this government may, as much as possible, be preserved from all suspicion of corruption, none of the Judges of the Supreme or other Courts, Sheriffs, or any other person or persons possessed of any post of profit under the government, other than Justices of the Peace, shall be entitled to a seat in the Assembly: but that, on his being elected, and taking his seat, his office or post shall be considered as vacant.

XXI. That all the laws of this Province, contained in the edition lately published by Mr. Allinson, shall be and remain in full force, until altered by the Legislature of this Colony (such only excepted, as are incompatible with this Charter) and shall be, according as heretofore, regarded in all respects, by all civil officers, and others, the good people of this Province.

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<sup>1</sup> This constitution was framed by a convention which assembled in accordance with the recommendation of the Continental Congress that the people of the colonies should form independent State governments, and which was in session, with closed doors, successively, at Burlington, Trenton, and New Brunswick, from May 26, 1776, until July 2, 1776, with intermissions. It was not submitted to the people, but its publication was ordered by the convention, July 3, 1776. [This constitution continued till 1844. — *En.*]

The legislature of New Jersey amended this constitution September 20, 1777, by substituting the words "State" and "States" for "colony" and "colonies."

XXII. That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.

Provided always, and it is the true intent and meaning of this Congress, that if a reconciliation between Great-Britain and these Colonies should take place, and the latter be taken again under the protection and government of the crown of Britain, this Charter shall be null and void — otherwise to remain firm and inviolable. — 2 *Poore's Constitutions*, 1311.

#### CONSTITUTION OF DELAWARE. 1776.<sup>1</sup>

*The constitution, or system of government, agreed to and resolved upon by the representatives in full convention of the Delaware State, formerly styled "The government of the counties of New Castle, Kent, and Sussex, upon Delaware," the said representatives being chosen by the freemen of the said State for that express purpose.*

ART. 12. The president and general assembly shall by joint ballot appoint three justices of the supreme court for the State, one of whom shall be chief justice, and a judge of admiralty, and also four justices of the courts of common pleas and orphans' courts for each county, one of whom in each court shall be styled "*chief justice*," (and in case of division on the ballot the president shall have an additional casting voice,) to be commissioned by the president under the great seal, who shall continue in office during good behavior; and during the time the justices of the said supreme court and courts of common pleas remain in office, they shall hold none other except in the militia. Any one of the justices of either of said courts shall have power, in case of the noncoming of his brethren, to open and adjourn the court. An adequate fixed but moderate salary shall be settled on them during their continuance in office. The president and privy council shall appoint the secretary, the attorney-general, registers for the probate of wills and granting letters of administration, registers in chancery, clerks of the courts of common pleas and orphans' courts, and clerks of the peace, who shall be commissioned as aforesaid, and remain in office during five years, if they behave themselves well; during which time the said registers in chancery and clerks shall not be justices of either of the said courts of which they are officers, but they shall have authority to sign all writs by them issued, and take recognizances of bail. The justices of the peace shall be nominated by the house of assembly; that is to say, they shall name twenty-four persons for each county, of whom the president, with the approbation of the privy council, shall appoint twelve, who shall be commissioned as aforesaid, and continue in office during seven years, if they behave themselves well; and in case of vacancies, or if the legislature shall think proper to increase the number, they shall be nominated and appointed in like manner. The members of the legislative and privy councils shall be justices of the peace for the whole State, during their continuance in trust; and the justices of the courts of common pleas shall be conservators of the peace in their respective counties.

ART. 17. There shall be an appeal from the supreme court of Delaware, in matters of law and equity, to a court of seven persons, to consist of the president for the time being, who shall preside therein, and six others, to be appointed, three by the legislative council, and three by the house of assembly, who shall continue in office during good behavior, and be commissioned by the president, under the great seal; which court shall be styled the "*court of appeals*," and have all the authority and powers heretofore given by law in the last resort to the King in council, under the old

<sup>1</sup> This constitution was framed by a convention which assembled at New Castle, August 27, 1776, in accordance with the recommendation of the Continental Congress that the people of the Colonies should form independent State governments. It was proclaimed September 21, 1776. [This constitution continued till 1792. — Ed.]

government. The secretary shall be the clerk of this court; and vacancies therein occasioned by death or incapacity, shall be supplied by new elections, in manner aforesaid.

ART. 18. The justices of the supreme court and courts of common pleas, the members of the privy council, the secretary, the trustees of the loan office, and clerks of the court of common pleas, during their continuance in office, and all persons concerned in any army or navy contracts, shall be ineligible to either house of assembly; and any member of either house accepting of any other of the offices hereinbefore mentioned (excepting the office of a justice of the peace) shall have his seat thereby vacated, and a new election shall be ordered.

ART. 22. Every person who shall be chosen a member of either house, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath, or affirmation, if conscientiously scrupulous of taking an oath, to wit:

"I, A B, will bear true allegiance to the Delaware State, submit to its constitution and laws, and do no act wittingly whereby the freedom thereof may be prejudiced."

And also make and subscribe the following declaration, to wit:

"I, A B, do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration."

And all officers shall also take an oath of office.

ART. 25. The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights, etc., agreed to by this convention.

ART. 30. No article of the declaration of rights and fundamental rules of this State, agreed to by this convention, nor the first, second, fifth, (except that part thereof that relates to the right of suffrage,) twenty-sixth, and twenty-ninth articles of this constitution, ought ever to be violated on any pretence whatever. No other part of this constitution shall be altered, changed, or diminished without the consent of five parts in seven of the assembly, and seven members of the legislative council. — 1 *Poore's Constitutions*, 273.

#### CONSTITUTION OF PENNSYLVANIA. 1776.<sup>1</sup>

##### *A Declaration of the Rights of the Inhabitants of the State of Pennsylvania.*

IV. That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

VI. That those who are employed in the legislative and executive business of the State, may be restrained from oppression, the people have a right, at such periods as they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections.

XIV. That a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislators and magistrates, in the making and executing such laws as are necessary for the good government of the state.

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<sup>1</sup> This constitution was framed by a convention (called in accordance with the expressed wish of the Continental Congress) which assembled at Philadelphia July 15, 1776, and completed its labors September 28, 1776. It was not submitted to the people for ratification. [This constitution continued till 1790. — Ed.]

*Plan or Frame of Government.*

SECT. 2. The supreme legislative power shall be vested in a house of representatives of the freemen of the commonwealth or state of Pennsylvania.

SECT. 3. The supreme executive power shall be vested in a president and council.

SECT. 4. Courts of justice shall be established in the city of Philadelphia, and in every county of this state.

SECT. 15. To the end that laws before they are enacted may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment; and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly; and for the more perfect satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in the preambles.<sup>1</sup>

SECT. 20.\* The president, and in his absence the vice-president, with the council, five of whom shall be a quorum, shall have power to appoint and commissionate judges, naval officers, judge of the admiralty, attorney general, and all other officers, civil and military, except such as are chosen by the general assembly or the people. . . . They shall sit as judges, to hear and determine on impeachments, taking to their assistance for advice only, the justices of the supreme court. And shall have power to grant pardons, and remit fines, in all cases whatsoever, except in cases of impeachment; and in cases of treason and murder, shall have power to grant reprieves, but not to pardon, until the end of the next sessions of assembly; but there shall be no remission or mitigation of punishments on impeachments, except by act of the legislature; they are also to take care that the laws be faithfully executed; they are to expedite the execution of such measures as may be resolved upon by the general assembly; and they may draw upon the treasury for such sums as shall be appropriated by the house. . . .

SECT. 22. Every officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly, either when in office, or after his resignation or removal for mal-administration: All impeachments shall be before the president or vice-president and council, who shall hear and determine the same.

SECT. 23. The judges of the supreme court of judicature shall have fixed salaries, be commissioned for seven years only, though capable of re-appointment at the end of that term, but removable for misbehaviour at any time by the general assembly; they shall not be allowed to sit as members in the continental congress, executive council, or general assembly, nor to hold any other office civil or military, nor to take or receive fees or perquisites of any kind.<sup>2</sup>

SECT. 24. The supreme court, and the several courts of common pleas of this commonwealth, shall, besides the powers usually exercised by such courts, have the powers of a court of chancery, so far as relates to the perpetuating testimony, obtaining evidence from places not within this state, and the care of the persons and estates of those who are *non compotes mentis*, and such other powers as may be found necessary by future general assemblies, not inconsistent with this constitution.

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<sup>1</sup> To the end that laws, before they are enacted, may be more maturely considered, and the inconveniency of hasty determination as much as possible prevented, all bills of public nature, shall be first laid before the Governor and Council, for their perusal and proposals of amendment, and shall be printed for the consideration of the people, before they are read in General Assembly, for the last time of debate and amendment; except temporary acts, which, after being laid before the Governor and Council, may (in case of sudden necessity) be passed into laws; and no other shall be passed into laws, until the next session of assembly. And for the more perfect satisfaction of the public, the reasons and motives for making such laws, shall be fully and clearly expressed and set forth in their preambles. — *Constitution of Vermont, 1777, s. XIV.*

— Ed.

<sup>2</sup> Omitted in Vermont Constitution. — Ed.

SECT. 40. Every officer, whether judicial, executive or military, in authority under this commonwealth, shall take the following oath or affirmation of allegiance, and general oath of office before he enters on the execution of his office.

THE OATH OR AFFIRMATION OF ALLEGIANCE.

*I ——— do swear (or affirm) that I will be true and faithful to the commonwealth of Pennsylvania: And that I will not directly or indirectly do any act or thing prejudicial or injurious to the constitution or government thereof, as established by the convention.*

THE OATH OR AFFIRMATION OF OFFICE:

*I ——— do swear (or affirm) that I will faithfully execute the office of ——— for the ——— of ——— and will do equal right and justice to all men, to the best of my judgment and abilities, according to law.*

SECT. 46. The declaration of rights is hereby declared to be a part of the constitution of this commonwealth, and ought never to be violated on any pretence whatever.

SECT. 47. In order that the freedom of the commonwealth may be preserved inviolate forever, there shall be chosen by ballot by the freemen in each city and county respectively, on the second Tuesday in October, in the year one thousand seven hundred and eighty-three, and on the second Tuesday in October, in every seventh year thereafter, two persons in each city and county of this state, to be called the COUNCIL OF CENSORS; who shall meet together on the second Monday of November next ensuing their election; the majority of whom shall be a quorum in every case, except as to calling a convention, in which two-thirds of the whole number elected shall agree: And whose duty it shall be to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled to by the constitution: They are also to enquire whether the public taxes have been justly laid and collected in all parts of this commonwealth, in what manner the public monies have been disposed of, and whether the laws have been duly executed. For these purposes they shall have power to send for persons, papers, and records; they shall have authority to pass public censures, to order impeachments, and to recommend to the legislature the repealing such laws as appear to them to have been enacted contrary to the principles of the constitution. These powers they shall continue to have, for and during the space of one year from the day of their election and no longer: The said council of censors shall also have power to call a convention, to meet within two years after their sitting, if there appear to them an absolute necessity of amending any article of the constitution which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people: But the articles to be amended, and the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject.

Passed in Convention the 28th day of September, 1776, and signed by their order.

BENJ. FRANKLIN, *Pres.*<sup>1</sup>  
2 *Poore's Constitutions*, 1540.

<sup>1</sup> Vermont, through a convention, adopted a constitution which went into effect in July, 1777. It was amended and recast by the Council of Censors in 1786. This instrument of 1777 was almost exactly the same as the first constitution of Pennsylvania. It had the same provisions given above, excepting as mentioned in notes. In the Vermont Constitution of 1786, Chap. II. Art. IX., it was provided that "The representatives so chosen . . . shall also, in conjunction with the Council, annually, (or oftener if need be) elect Judges of the Supreme and several County and Probate



CONSTITUTION OF MARYLAND. 1776.<sup>1</sup>

*A Declaration of Rights, and the Constitution and Form of Government, agreed to by the Delegates of Maryland, in free and full Convention assembled.*

## A DECLARATION OF RIGHTS, &amp;c.

... We, the Delegates of Maryland, in free and full Convention assembled, taking into our most serious consideration the best means of establishing a good Constitution in this State, for the sure foundation and more permanent security thereof, declare,

I. That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.

IV. That all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct; wherefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government. The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

V. That the right in the people to participate in the Legislature, is the best security of liberty, and the foundation of all free government; for this purpose, elections ought to be free and frequent, and every man, having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage.

VI. That the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other.

VII. That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed.

XXX. That the independency and uprightness of Judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people; wherefore the Chancellor and Judges ought to hold commissions during good behaviour; and the said Chancellor and Judges shall be removed for misbehaviour, on conviction in a court of law, and may be removed by the Governor, upon the address of the General Assembly; *Provided*, That two-thirds of all the members of each House concur in such address. That salaries, liberal, but not profuse, ought to be secured to the Chancellor and the Judges, during the continuance of their commissions, in such manner, and at such times, as the Legislature shall hereafter direct, upon consideration of the circumstances of this State. No Chancellor or Judge ought to hold any other office, civil or military, or receive fees or perquisites of any kind.

XXXI. That a long continuance, in the first executive departments of power or trust, is dangerous to liberty; a rotation, therefore, in those departments, is one of the best securities of permanent freedom.

XXXV. That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion.

XLI. That the subsisting resolves of this and the several Conventions held for this Colony, ought to be in force as laws, unless altered by this Convention, or the Legislature of this State.

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Courts, Sheriffs and Justices of the Peace: and also with the Council, may elect Major-Generals and Brigadier-Generals, from time to time, as often as there shall be occasion; and they shall have all other powers necessary for the Legislature of a free and sovereign State: but they shall have no power to add to, alter, abolish, or infringe, any part of this Constitution." — 2 *Poore's Constitutions*, 1870. — Ed.

<sup>1</sup> This constitution was framed by a convention which met at Annapolis August 14, 1776, and completed its labors November 11, 1776. It was not submitted to the people. [This constitution continued till 1851. — Ed.]

XLII. That this Declaration of Rights, or the Form of Government, to be established by this Convention, or any part or either of them, ought not to be altered, changed or abolished, by the Legislature of this State, but in such manner as this Convention shall prescribe and direct.

THE CONSTITUTION, OR FORM OF GOVERNMENT, &c.

I. THAT the Legislature consist of two distinct branches, a Senate and House of Delegates, which shall be styled, *The General Assembly of Maryland*.

XXV. That a person of wisdom, experience, and virtue, shall be chosen Governor, on the second Monday of November, seventeen hundred and seventy-seven, and on the second Monday in every year forever thereafter, by the joint ballot of both Houses. . . .

XL. That the Chancellor, all Judges, the Attorney-General, Clerks of the General Court, the Clerks of the County Courts, the Registers of the Land Office, and the Registers of Wills, shall hold their commissions during good behaviour, removable only for misbehaviour, on conviction in a Court of law.

XLVIII. That the Governor, for the time being, with the advice and consent of the Council, may appoint the Chancellor, and all Judges and Justices. . . .

LV. That every person, appointed to any office of profit or trust, shall, before he enters on the execution thereof, take the following oath; to wit: "I, A. B., do swear, that I do not hold myself bound in allegiance to the King of Great Britain, and that I will be faithful, and bear true allegiance to the State of Maryland;" and shall also subscribe a declaration of his belief in the Christian religion.

LVI. That there be a Court of Appeals, composed of persons of integrity and sound judgment in the law, whose judgment shall be final and conclusive, in all cases of appeal, from the General Court, Court of Chancery, and Court of Admiralty: that one person of integrity and sound judgment in the law, be appointed Chancellor: that three persons of integrity and sound judgment in the law, be appointed judges of the Court now called the Provincial Court; and that the same Court be hereafter called and known by the name of *The General Court*; which Court shall sit on the western and eastern shores, for transacting and determining the business of the respective shores, at such times and places as the future Legislature of this State shall direct and appoint.

LIX. That this Form of Government, and the Declaration of Rights, and no part thereof, shall be altered, changed, or abolished, unless a bill so to alter, change or abolish the same shall pass the General Assembly, and be published at least three months before a new election, and shall be confirmed by the General Assembly, after a new election of Delegates, in the first session after such new election; provided that nothing in this form of government, which relates to the eastern shore particularly, shall at any time hereafter be altered, unless for the alteration and confirmation thereof at least two-thirds of all the members of each branch of the General Assembly shall concur.

LX. That every bill passed by the General Assembly, when engrossed, shall be presented by the Speaker of the House of Delegates, in the Senate, to the Governor for the time being, who shall sign the same, and thereto affix the Great Seal, in the presence of the members of both Houses: every law shall be recorded in the General Court office of the western shore, and in due time printed, published, and certified under the Great Seal, to the several County Courts, in the same manner as hath been heretofore used in this State. — 1 *Poore's Constitutions*, 817.

CONSTITUTION OF NORTH CAROLINA. 1776.<sup>1</sup>

## A DECLARATION OF RIGHTS, &amp;c.

I. That all political power is vested in and derived from the people only.

IV. That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other.

V. That all powers of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised.

XXI. That a frequent recurrence to fundamental principles is absolutely necessary, to preserve the blessings of liberty.

## THE CONSTITUTION, OR FORM OF GOVERNMENT, &amp;c.

I.<sup>2</sup> That the legislative authority shall be vested in two distinct branches, both dependent on the people, to wit, a *Senate* and *House of Commons*.

XI. That all bills shall be read three times in each House, before they pass into laws, and be signed by the Speakers of both Houses.

XIII.<sup>3</sup> That the General Assembly shall, by joint ballot of both houses, appoint Judges of the Supreme Courts of Law and Equity, Judges of Admiralty, and Attorney-General, who shall be commissioned by the Governor, and hold their offices during good-behaviour.

XV.<sup>4</sup> That the Senate and House of Commons, jointly at their first meeting after each annual election, shall by ballot elect a Governor for one year, who shall not be eligible to that office longer than three years, in six successive years. . . .

XVI. That the Senate and House of Commons, jointly, at their first meeting after each annual election, shall by ballot elect seven persons to be a Council of State for one year, who shall advise the Governor in the execution of his office; and that four members shall be a quorum; their advice and proceedings shall be entered in a journal, to be kept for that purpose only, and signed by the members present; to any part of which, any member present may enter his dissent. And such journal shall be laid before the General Assembly when called for by them.

XXI. That the Governor, Judges of the Supreme Court of Law and Equity, Judges of Admiralty, and Attorney-General, shall have adequate salaries during their continuance in office.

XXIII. That the Governor, and other officers, offending against the State, by violating any part of this Constitution, mal-administration, or corruption, may be prosecuted, on the impeachment of the General Assembly, or presentment of the Grand Jury of any court of supreme jurisdiction in this State.

XXIX. That no Judge of the Supreme Court of Law or Equity, or Judge of Admiralty, shall have a seat in the Senate, House of Commons, or Council of State.

XLIV. That the Declaration of Rights is hereby declared to be part of the Constitution of this State, and ought never to be violated, on any pretence whatsoever. — 2 *Poore's Constitutions*, 1409.

<sup>1</sup> This constitution was framed by a "congress," "elected and chosen for that particular purpose," which assembled at Halifax November 12, 1776, and completed its labors December 18, 1776. It was not submitted to the people for ratification. [This constitution with amendments continued till 1861. — ED.]

<sup>2</sup> See amendments.

<sup>3</sup> See amendments.

<sup>4</sup> See amendments.

CONSTITUTION OF GEORGIA. 1777.<sup>1</sup>

We, therefore, the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State :

ARTICLE I. The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.

ART. II. The legislature of this State shall be composed of the representatives of the people, as is hereinafter pointed out ; and the representatives shall be elected yearly, and every year, on the first Tuesday in December ; and the representatives so elected shall meet the first Tuesday in January following, at Savannah, or any other place or places where the house of assembly for the time being shall direct.

On the first day of the meeting of the representatives so chosen, they shall proceed to the choice of a governor, who shall be styled "*honorable* ;" and of an executive council, by ballot out of their own body, viz. : two from each county, except those counties which are not yet entitled to send ten members. One of each county shall always attend, where the governor resides, by monthly rotation, unless the members of each county agree for a longer or shorter period. This is not intended to exclude either member attending. The remaining number of representatives shall be called the house of assembly ; and the majority of the members of the said house shall have power to proceed on business.

ART. VII. The house of assembly shall have power to make such laws and regulations as may be conducive to the good order and well-being of the State ; provided such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained in this constitution.

The house of assembly shall also have power to repeal all laws and ordinances they find injurious to the people ; and the house shall choose its own speaker, appoint its own officers, settle its own rules of proceeding, and direct writs of election for supplying intermediate vacancies, and shall have power of adjournment to any time or times within the year.

ART. VIII. All laws and ordinances shall be three times read, and each reading shall be on different and separate days, except in cases of great necessity and danger ; and all laws and ordinances shall be sent to the executive council after the second reading, for their perusal and advice.

ART. XIX. The governor shall, with the advice of the executive council, exercise the executive powers of government, according to the laws of this State and the constitution thereof, save only in the case of pardons and remission of fines, which he shall in no instance grant ; but he may reprieve a criminal, or suspend a fine, until the meeting of the assembly, who may determine therein as they shall judge fit.

ART. XXXVI. There shall be established in each county a court, to be called a superior court, to be held twice in each year. . . .

ART. XL. All causes, of what nature soever, shall be tried in the supreme court, except as hereafter mentioned ; which court shall consist of the chief-justice, and three or more of the justices residing in the county. In case of the absence of the chief-justice, the senior justice on the bench shall act as chief-justice, with the clerk of the county, attorney for the State, sheriff, coroner, constable, and the jurors ; and in case of the absence of any of the aforementioned officers, the justices to appoint others in their room *pro tempore*. And if any plaintiff or defendant in civil causes shall be dissatisfied with the determination of the jury, then, and in that case, they shall be at

<sup>1</sup> This constitution was framed by a convention which assembled at Savannah October 1, 1776, in accordance with the recommendation of the Continental Congress that the people of the Colonies should form independent State governments. It was unanimously agreed to February 5, 1777. [This constitution, with amendments, continued till 1789. — Ed.]

liberty, within three days, to enter an appeal from that verdict, and demand a new trial by a special jury, to be nominated as follows, viz.: each party, plaintiff and defendant, shall choose six, six more names shall be taken indifferently out of a box provided for that purpose, the whole eighteen to be summoned, and their names to be put together into the box, and the first twelve that are drawn out, being present, shall be the special jury to try the cause, and from which there shall be no appeal.

ART. XLI. The jury shall be judges of law, as well as of fact, and shall not be allowed to bring in a special verdict; but if all or any of the jury have any doubts concerning points of law, they shall apply to the bench, who shall each of them in rotation give their opinion.

ART. XLII. The jury shall be sworn to bring in a verdict according to law, and the opinion they entertain of the evidence; provided it be not repugnant to the rules and regulations contained in this constitution.

ART. XLIII. The special jury shall be sworn to bring in a verdict according to law, and the opinion they entertain of the evidence; provided it be not repugnant to justice, equity, and conscience, and the rules and regulations contained in this constitution, of which they shall judge.

ART. XLIX. Every officer of the State shall be liable to be called to account by the house of assembly.

ART. LX. The principles of the *habeas-corpus* act shall be a part of this constitution.

ART. LXIII. No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State; at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions proffered to the assembly by the majority of the counties as aforesaid. — 1 *Poore's Constitutions*, 377.

#### CONSTITUTION OF NEW YORK. 1777.<sup>1</sup>

I. This convention, therefore, in the name and by the authority of the good people of this State, doth ordain, determine, and declare that no authority shall, on any pretence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them.

II. This convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that the supreme legislative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the State of New York, the other to be called the senate of the State of New York; who together shall form the legislature, and meet once at least in every year for the despatch of business.

III. And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed: Be it ordained, that the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time, when the legislature shall be convened; for which, nevertheless, they shall not receive any salary or consideration, under any pretence whatever. And that all bills which have passed the senate and assembly shall, before they become laws, be presented to the said council for their revision and consideration; and if, upon such revision and consideration, it should appear improper

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<sup>1</sup> This constitution was framed by a convention which assembled at White Plains, July 10, 1776, and, after repeated adjournments and changes of location, terminated its labors at Kingston, Sunday evening, April 20, 1777, when the constitution was adopted, with but one dissenting vote. It was not submitted to the people for ratification. [This constitution, with amendments, continued till 1821. — ED.]

to the said council, or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the senate or house of assembly (in whichever the same shall have originated) who shall enter the objections sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration, two-thirds of the said senate or house of assembly shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law.

And in order to prevent any unnecessary delays, be it further ordained, that if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill within ten days impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days.<sup>1</sup>

XVII. And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that the supreme executive power and authority of this State shall be vested in a governor; and that statdly, once in every three years, and as often as the seat of government shall become vacant, a wise and discreet freeholder of this State shall be, by ballot, elected governor, by the freeholders of this State, qualified, as before described, to elect senators. . . .

XXIII. That all officers, other than those who, by this constitution, are directed to be otherwise appointed, shall be appointed in the manner following, to wit: The assembly shall, once in every year, openly nominate and appoint one of the senators from each great district, which senators shall form a council for the appointment of the said officers, of which the governor for the time being, or the lieutenant-governor, or the president of the senate, when they shall respectively administer the government, shall be president and have a casting voice, but no other vote; and with the advice and consent of the said council, shall appoint all the said officers; and that a majority of the said council be a quorum. And further, the said senators shall not be eligible to the said council for two years successively.

XXIV. . . . That the chancellor, the judges of the supreme court, and first judge of the county court in every county, hold their offices during good behavior or until they shall have respectively attained the age of sixty years.

XXXII. And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that a court shall be instituted for the trial of impeachments, and the correction of errors, under the regulations which shall be established by the legislature; and to consist of the president of the senate, for the time being, and the senators, chancellor, and judges of the supreme court, or the major part of them; except that when an impeachment shall be prosecuted against the chancellor, or either of the judges of the supreme court, the person so impeached shall be suspended from exercising his office until his acquittal; and, in like manner, when an appeal from a decree in equity shall be heard, the chancellor shall inform the court of the reasons of his decree, but shall not have a voice in the final sentence. And if the cause to be determined shall be brought up by writ of error, on a question of law, on a judgment in the supreme court, the judges of that court shall assign the reasons of such their judgment, but shall not have a voice for its affirmance or reversal.

XXXV. . . . And this convention doth further ordain, that the resolves or resolutions of the congresses of the colony of New York, and of the convention of the State of New York, now in force, and not repugnant to the government established by

<sup>1</sup> The whole number of bills passed by the legislature under this constitution was six thousand five hundred and ninety. The council of revision objected to one hundred and twenty-eight, of which seventeen were passed notwithstanding these objections. — *Hough*. [See Debates N. Y. Const. Conv. of 1821 for very interesting discussions as to the Council of Revision. — Ed.]

this constitution, shall be considered as making part of the laws of this State; subject, nevertheless, to such alterations and provisions as the legislature of this State may, from time to time, make concerning the same. — 2 *Poore's Constitutions*, 1328.

### CONSTITUTION OF CONNECTICUT. 1776.<sup>1</sup>

An Act containing an Abstract and Declaration of the Rights and Privileges of the People of this State, and securing the same.

*The People of this State, being by the Providence of God, free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign, and independent State; and having from their Ancestors derived a free and excellent Constitution of Government whereby the Legislature depends on the free and annual Election of the People, they have the best Security for the Preservation of their civil and religious Rights and Liberties. And forasmuch as the free Fruition of such Liberties and Privileges as Humanity, Civility and Christianity call for, as is due to every Man in his Place and Proportion, without Impeachment and Infringement, hath ever been, and will be the Tranquility and Stability of Churches and Commonwealths; and the Denial thereof, the Disturbance, if not the Ruin of both.*

PARAGRAPH 1. *Be it enacted and declared by the Governor, and Council, and House of Representatives, in General Court assembled, That the ancient Form of Civil Government, contained in the Charter from Charles the Second, King of England, and adopted by the People of this State, shall be and remain the Civil Constitution of this State, under the sole authority of the People thereof, independent of any King or Prince whatever. And that this Republic is, and shall forever be and remain, a free, sovereign and independent State, by the Name of the STATE or CONNECTICUT.*

2. *And be it further enacted and declared, That no Man's Life shall be taken away: No Man's Honor or good Name shall be stained: No Man's Person shall be arrested, restrained, banished, dismembered, nor any Ways punished: No Man shall be deprived of his Wife or Children: No Man's Goods or Estate shall be taken away from him, nor any Ways indamaged under the Colour of Law, or Countenance of Authority; unless clearly warranted by the Laws of this State.*

3. *That all the free Inhabitants of this or any other of the United States of America, and Foreigners in Amity with this State, shall enjoy the same justice and Law within this State, which is general for the State, in all Cases proper for the Cognizance of the Civil Authority and Court of Judicature within the same, and that without Partiality or Delay.*

4. *And that no Man's Person shall be restrained, or imprisoned, by any authority whatsoever, before the Law hath sentenced him thereunto, if he can and will give sufficient Security, Bail, or Mainprize for his Appearance and good Behaviour in the mean Time, unless it be for Capital Crimes, Contempt in open Court, or in such Cases wherein some express Law doth allow of, or order the same.*<sup>2</sup> — 1 *Poore's Constitutions*, 257.

<sup>1</sup> This continued the charter of 1662 in force as the organic law of the State.

<sup>2</sup> The charter of Charles II. (1 *Poore's Const.* 252) made certain persons and "all such others as now are or hereafter shall be admitted and made free of the company and society of our Colony of Connecticut . . . a body corporate and politic, . . . to the end the affairs and business . . . concerning the same (colony) may be duly ordered and managed."

The company was to be directed by a Governor, Deputy-Governor, and twelve assistants, chosen out of the freemen of the company, "which said officers shall apply themselves to take care for the best disposing and ordering of the general business and affairs of and concerning the land and hereditaments hereinafter mentioned to be

## RHODE ISLAND.

This State lived under the charter of Charles II. of 1663, until the year 1842, when a constitution was adopted of its own making. Several unsuccessful efforts to this end had previously been made. The charter was substantially like that of Connecticut.

PASSAGES FROM THE CONSTITUTION OF COLORADO. 1876.<sup>1</sup>

## PREAMBLE.

*We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe, in order to form a more independent and perfect government, establish justice, insure tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the State of Colorado.*

## ARTICLE I. BOUNDARIES.

The boundaries of the State of Colorado shall be as follows: Commencing on the thirty-seventh parallel of north latitude, where the twenty-fifth meridian of longitude west from Washington crosses the same; thence north on said meridian to the forty-first parallel of north latitude; thence along said parallel west to the thirty-second meridian of longitude west from Washington; then south on said meridian to the thirty-seventh parallel of north latitude; thence along said thirty-seventh parallel of north latitude to the place of beginning.

granted, and the plantation thereof, and the government of the people thereof." The Governor might call the company together at any time "to consult and advise of the business and affairs of the company." Twice a year, at least, there must be such a "general meeting," "assembly," or "court" of the freemen, or such as those of "the respective towns, cities, and places" should depute to act for them. These General Courts might admit other freemen or elect the Governor, Deputy-Governor, and assistants.

It was provided "that all, and every the subjects of us, our heirs, or successors, which shall go to inhabit within the said colony, and every of their children, which shall happen to be born there, or on the seas in going thither, or returning from thence, shall have and enjoy all liberties and immunities of free and natural subjects within any the dominions of us, our heirs, or successors, to all intents, constructions, and purposes whatsoever, as if they and every of them were born within the realm of England."

Power was given to the Governor, Deputy Governor, and assistants "to erect and make such judicatories, for the hearing, and determining of all actions, causes, matters, and things happening within the said colony, or plantation, and which shall be in dispute, and depending there, as they shall think fit, and convenient, and also from time to time to make, ordain, and establish all manner of wholesome, and reasonable laws, statutes, ordinances, directions, and instructions, not contrary to the laws of this realm of England, . . . ordaining and appointing, that all such laws, statutes and ordinances, instructions, impositions and directions as shall be so made by the Governor, Deputy-Governor, and assistants as aforesaid, and published in writing under their common seal, shall carefully and duly be observed, kept, performed, and put in execution, according to the true intent and meaning of the same, and these our letters patents, or the duplicate, or exemplification thereof, shall be to all and every such officers, superiors and inferiors from time to time, for the putting of the same orders, laws, statutes, ordinances, instructions, and directions in due execution, against us, our heirs and successors, a sufficient warrant and discharge."

Under this charter, adopted and supplemented in the brief enactment of 1776, the State of Connecticut lived until the year 1818. — Ed.

<sup>1</sup> See *ante*, 54. — Ed.



## ARTICLE II. BILL OF RIGHTS.

SEC. 14. That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic, or sanitary purposes.

SEC. 15. That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

SEC. 17. That no person shall be imprisoned for the purpose of securing his testimony in any case longer than may be necessary in order to take his deposition. If he can give security he shall be discharged; if he cannot give security, his deposition shall be taken by some judge of the Supreme, District, or County Court, at the earliest time he can attend, at some convenient place by him appointed for that purpose, of which time and place the accused and the attorney prosecuting for the people shall have reasonable notice. The accused shall have the right to appear in person and by counsel. If he have no counsel the judge shall assign him one in that behalf only. On the completion of such examination the witness shall be discharged on his own recognizance, entered in before said judge, but such deposition shall not be used if, in the opinion of the court, the personal attendance of the witness might be procured by the prosecution, or is procured by the accused. No exception shall be taken to such deposition as to matters of form.

SEC. 18. That no person shall be compelled to testify against himself in a criminal case, nor shall any person be twice put in jeopardy for the same offence. If the jury disagree, or if the judgment be arrested after verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.

SEC. 23. The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment: *Provided*, the General Assembly may change, regulate, or abolish the grand-jury system.

## ARTICLE V. LEGISLATIVE DEPARTMENT.

SEC. 6. Each member of the first General Assembly, as a compensation for his services, shall receive four dollars for each day's attendance, and fifteen cents for each mile necessarily travelled in going to and returning from the seat of government; and shall receive no other compensation, perquisite, or allowance whatsoever. No session of the General Assembly, after the first, shall exceed forty days. After the first session the compensation of the members of the General Assembly shall be as provided by law: *Provided*, That no General Assembly shall fix its own compensation.

SEC. 19. No Act of the General Assembly shall take effect until ninety days after its passage, unless in case of emergency (which shall be expressed in the preamble or body of the Act), the General Assembly shall, by a vote of two-thirds of all the members elected to each House, otherwise direct. No bill, except the general appropriation for the expenses of the government only, introduced in either House of the General Assembly after the first twenty-five days of the session shall become a law.

SEC. 20. No bill shall be considered or become a law unless referred to a committee, returned therefrom, and printed for the use of the members.

SEC. 21. No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed.

SEC. 22. Every bill shall be read at length, on three different days, in each House; all substantial amendments made thereto shall be printed for the use of the members, before the final vote is taken on the bill; and no bill shall become a law except by vote of a majority of all the members elected to each House, nor unless on its final passage the vote be taken by ayes and noes, and the names of those voting be entered on the journal.

SEC. 23. No amendment to any bill by one House shall be concurred in by the other, nor shall the report of any committee of conference be adopted in either House, except by a vote of a majority of the members elected thereto, taken by ayes and noes, and the names of those voting recorded upon the journal thereof.

SEC. 24. No law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length.

SEC. 25. The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For granting divorces; laying out, opening, altering, or working roads or highways; vacating roads, town-plats, streets, alleys, and public grounds; locating or changing county-seats; regulating county or township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables; changing the rules of evidence in any trial or inquiry; providing for changes of venue in civil or criminal cases; declaring any person of age; for limitation of civil actions or giving effect to informal or invalid deeds; summoning or impanelling grand or petit juries; providing for the management of common schools; regulating the rate of interest on money; the opening or conducting of any election, or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; the protection of game or fish; chartering or licensing ferries or toll-bridges; remitting fines, penalties, or forfeitures; creating, increasing, or decreasing fees, percentage, or allowances of public officers; changing the law of descent; granting to any corporation, association, or individual the right to lay down railroad-tracks; granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever. In all other cases, where a general law can be made applicable, no special law shall be enacted.

SEC. 26. The presiding officer of each House shall, in the presence of the House over which he presides, sign all bills and joint resolutions passed by the General Assembly, after their titles shall have been publicly read, immediately before signing; and the fact of signing shall be entered on the journal.

SEC. 27. The General Assembly shall prescribe by law the number, duties, and compensation of the officers and employes of each House; and no payment shall be made from the State Treasury, or be in any way authorized to any person, except to an acting officer or employe elected or appointed in pursuance of law.

SEC. 28. No bill shall be passed giving any extra compensation to any public officer, servant or employe, agent or contractor, after services shall have been rendered or contract made, nor providing for the payment of any claim made against the State without previous authority of law.

SEC. 29. All stationery, printing, paper, and fuel used in the legislative and other departments of government, shall be furnished; and the printing and binding and distributing of the laws, journals, department reports, and other printing and binding; and the repairing and furnishing the halls and rooms used for the meeting of the General Assembly and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price and under such regulations as may be prescribed by law. No member or officer of any department of the government shall be in any way interested in any such contract; and all such contracts shall be subject to the approval of the Governor and State Treasurer.

SEC. 30. Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment: *Provided*, This shall not be construed to forbid the General Assembly to fix the salary or emoluments of those first elected or appointed under this Constitution.

SEC. 31. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose amendments, as in case of other bills.

SEC. 32. The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the State, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

SEC. 33. No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof.

SEC. 34. No appropriation shall be made for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of the State, nor to any denominational or sectarian institution or association.

SEC. 35. The General Assembly shall not delegate to any special commission, private corporation, or association any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes, or to perform any municipal function whatever.

SEC. 36. No act of the General Assembly shall authorize the investment of trust-funds by executors, administrators, guardians, or other trustees, in the bonds or stock of any private corporation.

SEC. 38. No obligation or liability of any person, association, or corporation, held or owned by the State, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, or postponed, or in any way diminished by the General Assembly, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury.

SEC. 39. Every order, resolution, or vote to which the concurrence of both Houses may be necessary, except on the question of adjournment, or relating solely to the transaction of business of the two Houses, shall be presented to the Governor, and before it shall take effect, be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses, according to the rules and limitations prescribed in case of a bill.

SEC. 40. If any person elected to either House of the General Assembly shall offer or promise to give his vote or influence in favor of or against any measure or proposition, pending or proposed to be introduced into the General Assembly, in consideration or upon condition that any other person elected to the same General Assembly will give or will promise or assent to give his vote or influence in favor of or against any other measure or proposition, pending or proposed to be introduced in such General Assembly, the person making such offer or promise shall be deemed guilty of solicitation and bribery. If any member of the General Assembly shall give his vote or influence for or against any measure or proposition pending in such General Assembly, or offer, promise, or assent so to do, upon condition that any other member will give or will promise or assent to give his vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced in such General Assembly, or in consideration that any other member hath given his vote or influence for or against any other measure or proposition in such General Assembly, he shall be deemed guilty of bribery; and any member of the General Assembly, or person elected thereto, who shall be guilty of either of such offences shall be expelled, and shall not be thereafter eligible to the same General Assembly; and, on the conviction thereof in the civil courts, shall be liable to such further penalty as may be prescribed by law.

SEC. 41. Any person who shall, directly or indirectly, offer, give, or promise any money or thing of value, testimonial, privilege, or personal advantage to any executive or judicial officer or member of the General Assembly to influence him in the performance of any of his public or official duties, shall be deemed guilty of bribery, and be punished in such manner as shall be provided by law.

SEC. 42. The offence of corrupt solicitation of members of the General Assembly, or of public officers of the State, or of any municipal division thereof, and any occupation or practice of solicitation of such members or officers to influence their official action, shall be defined by law, and shall be punished by fine and imprisonment.

SEC. 43. A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly, shall disclose the fact to the House of which he is a member, and shall not vote thereon.

#### ARTICLE VI. JUDICIAL DEPARTMENT. *Supreme Court.*

SEC. 6. The judges of the Supreme Court shall be elected by electors of the State at large, as hereinafter provided.

SEC. 7. The term of office of the judges of the Supreme Court, except as in this article otherwise provided, shall be nine years.

SEC. 8. The judges of the Supreme Court shall, immediately after the first election under this Constitution, be classified by lot, so that one shall hold his office for the term of three years, one for the term of six years, and one for the term of nine years. The lot shall be drawn by the judges, who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the Secretary of the Territory, and filed in his office. The judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all terms of the Supreme Court, and, in case of his absence, the judge having in like manner the next shortest term to serve shall preside in his stead.

*District Courts.* SEC. 18. The judges of the Supreme and District Courts shall each receive such salary as may be provided by law; and no such judge shall receive any other compensation, perquisite, or emolument for or on account of his office, in any form whatever, nor act as attorney or counsellor at law.

*Miscellaneous.* SEC. 27. The judges of Courts of Record, inferior to the Supreme Court, shall, on or before the first day in July in each year, report in writing to the judges of the Supreme Court such defects and omissions in the laws as their knowledge and experience may suggest, and the judges of the Supreme Court shall, on or before the first day of December of each year, report in writing to the Governor, to be by him transmitted to the General Assembly, together with his message, such defects and omissions in the Constitution and laws as they may find to exist, together with appropriate bills for curing the same.

#### ARTICLE VII. SUFFRAGE AND ELECTIONS.

SECTION 1. Every male person over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections:

First. He shall be a citizen of the United States, or, not being a citizen of the United States, he shall have declared his intention, according to law, to become such citizen, not less than four months before he offers to vote.

Second. He shall have resided in the State six months immediately preceding the election at which he offers to vote, and in the county, city, town, ward, or precinct, such time as may be prescribed by law: *Provided*, That no person shall be denied the right to vote at any school-district election, nor to hold any school-district office, on account of sex.

SEC. 2. The General Assembly shall, at the first session thereof, and may at any subsequent session, enact laws to extend the right of suffrage to women of lawful age, and otherwise qualified according to the provisions of this article. No such enactment shall be of effect until submitted to the vote of the qualified electors at a general election, nor unless the same be approved by a majority of those voting thereon.

SEC. 3. The General Assembly may prescribe, by law, an educational qualification for electors, but no such law shall take effect prior to the year of our Lord one thousand eight hundred and ninety, and no qualified elector shall be thereby disqualified.

SEC. 4. For the purpose of voting and eligibility to office, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while in the civil or military service of the State, or of the United States, nor while a student at any institution of learning, nor while kept at public expense in any poor-house or other asylum, nor while confined in public prison.

SEC. 5. Voters shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning therefrom.

SEC. 6. No person except a qualified elector shall be elected or appointed to any civil or military office in the State.

SEC. 9. In trials of contested elections, and for offences arising under the election-law, no person shall be permitted to withhold his testimony on the ground that it may criminate himself, or subject him to public infamy; but such testimony shall not be used against him in any judicial proceedings, except for perjury in giving such testimony.

SEC. 10. No person while confined in any public prison shall be entitled to vote; but every such person who was a qualified elector prior to such imprisonment, and who is released therefrom by virtue of a pardon, or by virtue of having served out his full term of imprisonment, shall, without further action, be invested with all the rights of citizenship, except as otherwise provided in this Constitution.

#### ARTICLE VIII. STATE INSTITUTIONS.

SEC. 2. The General Assembly shall have no power to change or to locate the seat of government of the State, but shall at its first session subsequent to the year of our Lord one thousand eight hundred and eighty, provide by law for submitting the question of the permanent location of the seat of government to the qualified electors of the State, at the general election then next ensuing, and a majority of all the votes upon said question, cast at said election, shall be necessary to determine the location thereof. Said General Assembly shall also provide that in case there shall be no choice of location at said election, the question of choice between the two places for which the highest number of votes shall have been cast, shall be submitted in like manner to the qualified electors of the State, at the next general election: *Provided*, That until the seat of government shall have been permanently located as herein provided, the temporary location thereof shall remain at the city of Denver.

SEC. 3. When the seat of government shall have been located as herein provided, the location thereof shall not thereafter be changed except by a vote of two-thirds of all the qualified electors of the State voting on that question, at a general election, at which the question of location of the seat of government shall have been submitted by the General Assembly.

SEC. 4. The General Assembly shall make no appropriation or expenditures for capitol buildings or grounds until the seat of government shall have been permanently located as herein provided.

SEC. 5. The following territorial institutions, to wit, The University at Boulder, the Agricultural College at Fort Collins, the School of Mines at Golden, the Institute for the Education of Mutes at Colorado Springs, shall, upon the adoption of this Constitution, become institutions of the State of Colorado, and the management thereof subject to the control of the State, under such laws and regulations as the General Assembly shall provide; and the location of said institutions, as well as all gifts, grants, and appropriations of money and property, real and personal, heretofore made to said several institutions, are hereby confirmed to the use and benefit of the same respectively. *Provided*, This section shall not apply to any institution, the property, real or personal, of which is now vested in the trustees thereof, until such property be transferred by proper conveyance, together with the control thereof, to the officers provided for the management of said institution by this Constitution or by law.

## ARTICLE IX. EDUCATION.

SEC. 2. The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the State wherein all residents of the State between the ages of six and twenty-one years may be educated gratuitously. One or more public schools shall be maintained in each school-district within the State at least three months in each year; any school-district failing to have such school shall not be entitled to receive any portion of the school-fund for that year.

SEC. 7. Neither the General Assembly, nor any county, city, town, township, school-district, or other public corporation shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church or for any sectarian purpose.

SEC. 8. No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color.

SEC. 10. It shall be the duty of the State Board of Land Commissioners to provide for the location, protection, sale, or other disposition of all the lands heretofore, or which may hereafter be, granted to the State by the General Government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor. No law shall ever be passed by the General Assembly granting any privileges to persons who may have settled upon any such public lands subsequent to the survey thereof by the General Government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. The General Assembly shall, at the earliest practicable period, provide by law that the several grants of land made by Congress to the State shall be judiciously located and carefully preserved and held in trust subject to disposal for the use and benefit of the respective objects for which said grants of land were made, and the General Assembly shall provide for the sale of said lands from time to time, and for the faithful application of the proceeds thereof in accordance with the terms of said grants.

## ARTICLE X. REVENUE.

SEC. 3. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal: *Provided*, That mines and mining-claims, bearing gold, silver, and other precious metals (except the net proceeds and surface improvements thereof), shall be exempt from taxation for the period of ten years from the date of the adoption of this Constitution, and thereafter may be taxed as provided by law. Ditches, canals, and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose.

SEC. 5. Lots, with the buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools, or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law.

SEC. 6. All laws exempting from taxation property other than that hereinbefore mentioned shall be void.

SEC. 7. The General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by law, vest in the corporate authorities thereof respectively the power to assess and collect taxes for all purposes of such corporation.

SEC. 8. No county, city, town, or other municipal corporation, the inhabitants thereof, nor the property therein, shall be released or discharged from their, or its, proportionate share of taxes to be levied for State purposes.

SEC. 9. The power to tax corporations and corporate property, real and personal, shall never be relinquished or suspended.

SEC. 10. All corporations in this State, or doing business therein, shall be subject to taxation for State, county, school, municipal, and other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax.

SEC. 11. The rate of taxation on property, for State purposes, shall never exceed six mills on each dollar of valuation; and whenever the taxable property within the State shall amount to one hundred million dollars the rate shall not exceed four mills on each dollar of valuation; and whenever the taxable property within the State shall amount to three hundred million dollars the rate shall never thereafter exceed two mills on each dollar of valuation, unless a proposition to increase such rate, specifying the rate proposed, and the time during which the same shall be levied, be first submitted to a vote of such of the qualified electors of the State as in the year next preceding such election shall have paid a property-tax assessed to them within the State, and a majority of those voting thereon shall vote in favor thereof, in such manner as may be provided by law.

SEC. 12. The Treasurer shall keep a separate account of each fund in his hands, and shall, at the end of each quarter of the fiscal year, report to the Governor in writing, under oath, the amount of all moneys in his hands to the credit of every such fund, and the place where the same are kept or deposited, and the number and amount of every warrant received, and the number and amount of every warrant paid therefrom during the quarter. Swearing falsely to any such report shall be deemed perjury. The Governor shall cause every such report to be immediately published in at least one newspaper printed at the seat of government, and otherwise as the General Assembly may require. The General Assembly may provide by law further regulations for the safe-keeping and management of the public funds in the hands of the Treasurer; but notwithstanding any such regulation, the Treasurer and his sureties shall in all cases be held responsible therefor.

SEC. 13. The making of profit, directly or indirectly, out of State, county, city, town, or school-district money, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law.

SEC. 14. Private property shall not be taken or sold for the payment of the corporate debt of municipal corporations.

SEC. 15. There shall be a State Board of Equalization, consisting of the Governor, State Auditor, State Treasurer, Secretary of State, and Attorney-General; also, in each county of this State, a County Board of Equalization, consisting of the Board of County Commissioners of said county. The duty of the State Board of Equalization shall be to adjust and equalize the valuation of real and personal property among the several counties of the State. The duty of the County Board of Equalization shall be to adjust and equalize the valuation of real and personal property within their respective counties. Each board shall also perform such other duties as may be prescribed by law.

SEC. 16. No appropriation shall be made, nor any expenditure authorized by the General Assembly, whereby the expenditure of the State, during any fiscal year, shall exceed the total tax then provided for by law and applicable for such appropriation or expenditure, unless the General Assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in section eleven of this article, to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the State, or assist in defending the United States in time of war.

## ARTICLE XI. PUBLIC INDEBTEDNESS.

SECTION I. Neither the State, nor any county, city, town, township, or school-district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company, or corporation, public or private, for any amount or for any purpose whatever, or become responsible for any debt, contract, or liability of any person, company, or corporation, public or private, in or out of the State.

SEC. 2. Neither the State, nor any county, city, town, township, or school-district shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in, any corporation or company, or a joint owner with any person, company, or corporation, public or private, in or out of the State, except as to such ownership as may accrue to the State by escheat, or by forfeiture, by operation or provision of law; and except as to such ownership as may accrue to the State, or to any county, city, town, township, or school-district, or to either or any of them, jointly with any person, company, or corporation, by forfeiture or sale of real estate for non-payment of taxes, or by donation or devise for public use, or by purchase by or on behalf of any or either of them, jointly with any or either of them, under execution in cases of fine, penalties, or forfeiture of recognizance, breach of condition of official bond, or of bond to secure public moneys, or the performance of any contract in which they or any of them may be jointly or severally interested.

SEC. 3. The State shall not contract any debt by loan, in any form, except to provide for casual deficiencies of revenue, erect public buildings for use of the State, suppress insurrection, defend the State, or, in time of war, assist in defending the United States; and the amount of debt contracted in any one year to provide for deficiencies of the revenue shall not exceed one-fourth of a mill on each dollar of valuation of taxable property within the State, and the aggregate amount of such debt shall not at any time exceed three-fourths of a mill on each dollar of said valuation until the valuation shall equal one hundred millions of dollars, and thereafter such debt shall not exceed one hundred thousand dollars, and the debt incurred in any one year for erection of public buildings shall not exceed one-half mill on each dollar of said valuation, and the aggregate amount of such debt shall never at any time exceed the sum of fifty thousand dollars (except as provided in section five of this article); and in all cases the valuation in this section mentioned shall be that of the assessment last preceding the creation of said debt.

SEC. 4. In no case shall any debt above mentioned in this article be created, except by a law which shall be irrevocable, until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purposes to which the funds so raised shall be applied, and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of, such debt within the time limited by such law for the payment thereof, which, in the case of debts contracted for the erection of public buildings and supplying deficiencies of revenue, shall not be less than ten nor more than fifteen years; and the funds arising from the collection of any such tax shall not be applied to any other purpose than that provided in the law levying the same; and when the debt thereby created shall be paid or discharged such tax shall cease, and the balance, if any, to the credit of the fund, shall immediately be placed to the credit of the general fund of the State.

SEC. 5. A debt for the purpose of erecting public buildings may be created by law, as provided for in section four of this article, not exceeding in the aggregate three mills on each dollar of said valuation: *Provided*, That before going into effect such law shall be ratified by the vote of a majority of such qualified electors of the State as shall vote thereon at a general election, under such regulations as the General Assembly may prescribe.

SEC. 6. No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one



dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof; and the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years; and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: *Provided*, That this section shall not apply to counties having a valuation of less than one million of dollars.

SEC. 7. No debt by loan in any form shall be contracted by any school-district for the purpose of erecting and furnishing school-buildings or purchasing grounds, unless the proposition to create such debt shall first be submitted to such qualified electors of the districts as shall have paid a school-tax therein in the year next preceding such election, and a majority of those voting thereon shall vote in favor of incurring such debt.

SEC. 8. No city or town shall contract any debt by loan in any form, except by means of an ordinance, which shall be irrevocable until the indebtedness therein provided for shall have been fully paid or discharged, specifying the purposes to which the funds to be raised shall be applied, and providing for the levy of a tax, not exceeding twelve mills on each dollar of valuation of taxable property within such city or town, sufficient to pay the annual interest and extinguish the principal of such debt within fifteen, but not less than ten, years from the creation thereof; and such tax, when collected, shall be applied only to the purposes in such ordinance specified until the indebtedness shall be paid or discharged; but no such debt shall be created unless the question of incurring the same shall, at a regular election for councilmen, aldermen, or officers of such city or town, be submitted to a vote of such qualified electors thereof as shall, in the year next preceding, have paid a property-tax therein, and a majority of those voting on the question, by ballot deposited in a separate ballot-box, shall vote in favor of creating such debt; but the aggregate amount of debt so created, together with the debt existing at the time of such election, shall not at any time exceed three per cent of the valuation last aforesaid. Debts contracted for supplying water to such city or town are excepted from the operation of this section. The valuation in this section mentioned shall be in all cases that of the assessment next preceding the last assessment before the adoption of such ordinance.

SEC. 9. Nothing contained in this article shall be so construed as to either impair or add to the obligation of any debt heretofore contracted by any county, city, town, or school-district in accordance with the laws of Colorado Territory, or prevent the contracting of any debt, or the issuing of bonds therefor, in accordance with said laws, upon any proposition for that purpose which may have been, according to said laws, submitted to a vote of the qualified electors of any county, city, town, or school-district before the day on which this Constitution takes effect.

## ARTICLE XII. OFFICERS.

SECTION 1. Every person holding any civil office under the State or any municipality therein shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified; but this shall not apply to members of the General Assembly, nor to members of any board or assembly two or more of whom are elected at the same time; the General Assembly may by law provide for suspending any officer in his functions pending impeachment or prosecution for misconduct in office.

SEC. 2. No person shall hold any office or employment of trust or profit, under the laws of the State or any ordinance of any municipality therein, without devoting his personal attention to the duties of the same.

SEC. 3. No person who is now or hereafter may become a collector or receiver of

public money, or the deputy or assistant of such collector or receiver, and who shall have become a defaulter in his office, shall be eligible to or assume the duties of any office of trust or profit in this State, under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all public money for which he may be accountable.

SEC. 4. No person hereafter convicted of embezzlement of public moneys, bribery, perjury, solicitation of bribery, or subornation of perjury, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this State.

SEC. 5. The District Court of each county shall, at each term thereof, specially give in charge to the grand jury, if there be one, the laws regulating the accountability of the County Treasurer, and shall appoint a committee of such grand jury, or of other reputable persons, not exceeding five, to investigate the official accounts and affairs of the treasurer of such county, and report to the court the condition thereof. The judge of the District Court may appoint a like committee in vacation at any time, but not oftener than once in every three months. The District Court of the county wherein the seat of government may be shall have the like power to appoint committees to investigate the official accounts and affairs of the State Treasurer and the Auditor of State.

SEC. 6. Any civil officer or member of the General Assembly who shall solicit, demand, or receive, or consent to receive, directly or indirectly, for himself or for another, from any company, corporation, or person, any money, office, appointment, employment, testimonial, reward, thing of value or enjoyment, or of personal advantage or promise thereof, for his vote, official influence, or action, or for withholding the same, or with an understanding that his official influence or action shall be in any way influenced thereby, or who shall solicit or demand any such money or advantage, matter, or thing aforesaid for another, as the consideration of his vote, official influence, or action, or for withholding the same, or shall give or withhold his vote, official influence, or action in consideration of the payment or promise of such money, advantage, matter, or thing to another, shall be held guilty of bribery, or solicitation of bribery, as the case may be, within the meaning of this Constitution, and shall incur the disabilities provided thereby for such offence, and such additional punishment as is or shall be prescribed by law.

#### ARTICLE XIV. COUNTIES.

SECTION 1. The several counties of the Territory of Colorado, as they now exist, are hereby declared to be counties of the State.

SEC. 2. The General Assembly shall have no power to remove the county-seat of any county, but the removal of county-seats shall be provided for by general law, and no county-seat shall be removed unless a majority of the qualified electors of the county, voting on the proposition at a general election, vote therefor; and no such proposition shall be submitted oftener than once in four years, and no person shall vote on such proposition who shall not have resided in the county six months and in the election-precinct ninety days next preceding such election.

SEC. 3. No part of the territory of any county shall be stricken off and added to an adjoining county without first submitting the question to the qualified voters of the county from which the territory is proposed to be stricken off; nor unless a majority of all the qualified voters of said county voting on the question shall vote therefor.

SEC. 4. In all cases of the establishment of any new county, the new county shall be held to pay its ratable proportion of all then existing liabilities of the county or counties from which such new county shall be formed.

SEC. 5. When any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its ratable proportion of all then existing liabilities of the county from which it is taken.

#### COUNTY OFFICERS.

SEC. 11. There shall, at the first election at which county officers are chosen, and annually thereafter, be elected in each precinct one justice of the peace and one

constable, who shall each hold his office for the term of two years: *Provided*, That in precincts containing five thousand or more inhabitants, the number of justices and constables may be increased as provided by law.

SEC. 12. The General Assembly shall provide for the election or appointment of such other county, township, precinct, and municipal officers as public convenience may require; and their terms of office shall be as prescribed by law, not in any case to exceed two years.

SEC. 13. The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four, and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers, and be subject to the same restrictions.

#### ARTICLE XV. CORPORATIONS.

SEC. 3. The General Assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the corporators.

SEC. 4. All railroads shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this State, and to connect at the State line with railroads of other States and Territories. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad.

SEC. 5. No railroad corporation, or the lessees or managers thereof, shall consolidate its stock, property, or franchises with any other railroad corporation owning or having under its control a parallel or competing line.

SEC. 6. All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager, or employé thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive-power.

SEC. 7. No railroad or other transportation company in existence at the time of the adoption of this Constitution shall have the benefit of any future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution in binding form.

SEC. 8. The right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals; and the police powers of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State.

SEC. 9. No corporation shall issue stocks or bonds, except for labor done, services performed, or money or property actually received, and all fictitious increase of stock and indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock, first obtained at a meeting held after at least thirty days' notice given in pursuance of law.

SEC. 10. No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served.

SEC. 11. No street railroad shall be constructed within any city, town, or incorporated village without the consent of the local authorities having the control of the street or highway proposed to be occupied by such street-railroad.

SEC. 12. The General Assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its

operation, or which imposes on the people of any county or municipal subdivision of the State a new liability in respect to transactions or considerations already past.

SEC. 13. Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines; and the General Assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in, the stock or bonds of any other telegraph company owning or having the control of a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph.

SEC. 14. If any railroad, telegraph, express, or other corporation organized under any of the laws of this State shall consolidate, by sale or otherwise, with any railroad, telegraph, express, or other corporation organized under any laws of any other State or Territory, or of the United States, the same shall not thereby become a foreign corporation, but the courts of this State shall retain jurisdiction over that part of the corporate property within the limits of the State in all matters which may arise, as if said consolidation had not taken place.

SEC. 15. It shall be unlawful for any person, company, or corporation to require of its servants or employes, as a condition of their employment or otherwise, any contract or agreement whereby such person, company, or corporation shall be released or discharged from liability or responsibility on account of personal injuries received by such servants or employes while in the service of such person, company, or corporation by reason of the negligence of such person, company, or corporation, or the agents or employes thereof; and such contracts shall be absolutely null and void.

#### ARTICLE XVI. MINING AND IRRIGATION.

##### *Mining.*

SEC. 2. The General Assembly shall provide by law for the proper ventilation of mines, the construction of escapement-shafts, and such other appliances as may be necessary to protect the health and secure the safety of the workmen therein, and shall prohibit the employment in the mines of children under twelve years of age.

SEC. 3. The General Assembly may make such regulations from time to time as may be necessary for the proper and equitable drainage of mines.

SEC. 4. The General Assembly may provide that the science of mining and metallurgy be taught in one or more of the institutions of learning under the patronage of the State.

##### *Irrigation.*

SEC. 5. The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public; and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.

SEC. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

SEC. 7. All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, canals, and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

SEC. 8. The General Assembly shall provide by law that the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

## ARTICLE XVII. MILITIA.

SEC. 4. The General Assembly shall provide for the safe-keeping of the public arms, military records, relics, and banners of the State.

SEC. 5. No person having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: *Provided*, Such person shall pay an equivalent for such exemption.

## ARTICLE XVIII. MISCELLANEOUS.

SECTION 1. The General Assembly shall pass liberal homestead and exemption laws.

SEC. 2. The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift-enterprise tickets in this State.

SEC. 3. It shall be the duty of the General Assembly to pass such laws as may be necessary and proper to decide differences by arbitrators, to be appointed by mutual agreement of the parties to any controversy, who may choose that mode of adjustment. The powers and duties of such arbitrators shall be as prescribed by law.

SEC. 5. The General Assembly shall prohibit by law the importation into this State, for the purpose of sale, of any spurious, poisonous, or drugged spirituous liquors, or spirituous liquors adulterated with any poisonous or deleterious substance, mixture, or compound; and shall prohibit the compounding or manufacture within this State, except for chemical or mechanical purposes, of any of said liquors, whether they be denominated spirituous, vinous, malt, or otherwise; and shall also prohibit the sale of any such liquors to be used as a beverage; and any violation of either of said prohibitions shall be punished by fine and imprisonment. The General Assembly shall provide by law for the condemnation and destruction of all spurious, poisonous, or drugged liquors herein prohibited.

SEC. 6. The General Assembly shall enact laws in order to prevent the destruction of, and to keep in good preservation, the forests upon the lands of the State, or upon lands of the public domain, the control of which shall be conferred by Congress upon the State.

SEC. 7. The General Assembly may provide that the increase in the value of private lands, caused by the planting of hedges, orchards, and forests thereon, shall not, for a limited time, to be fixed by law, be taken into account in assessing such lands for taxation.

SEC. 8. The General Assembly shall provide for the publication of the laws passed at each session thereof; and, until the year 1900, they shall cause to be published in Spanish and German a sufficient number of copies of said laws to supply that portion of the inhabitants of the State who speak those languages, and who may be unable to read and understand the English language.

## ARTICLE XIX. FUTURE AMENDMENTS.

SECTION 1. The General Assembly may, at any time, by a vote of two-thirds of the members elected to each House, recommend to the electors of the State to vote at the next general election for or against a convention to revise, alter, and amend this Constitution; and if a majority of those voting on the question shall declare in favor of such convention, the General Assembly shall, at its next session, provide for the calling thereof. The number of members of the convention shall be twice that of the Senate, and they shall be elected in the same manner, at the same places, and in the same districts. The General Assembly shall, in the act calling the convention, designate the day, hour, and place of its meeting; fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding the members shall take an oath to support the Constitution of the United States and of the State of Colorado, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of members of the Senate, and vacancies occurring shall be filled in the

manner provided for filling vacancies in the General Assembly. Said convention shall meet within three months after such election, and prepare such revisions, alterations, or amendments to the Constitution as may be deemed necessary, which shall be submitted to electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration, or amendment shall take effect.

SEC. 2. Any amendment or amendments to this Constitution may be proposed in either House of the General Assembly, and if the same shall be voted for by two-thirds of all the members elected to each House, such proposed amendments, together with the ayes and noes of each House thereon, shall be entered in full on their respective journals; and the Secretary of State shall cause the said amendment or amendments to be published in full in at least one newspaper in each county, (if such there be,) for three months previous to the next general election for members to the General Assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the State for their approval or rejection, and such as are approved by a majority of those voting thereon shall become part of this Constitution; but the General Assembly shall have no power to propose amendments to more than one article of this Constitution at the same session.

[The instrument closes with a long "Schedule," of the sort which was appended to the Pennsylvania Constitution of 1790, providing for certain details, "that no inconvenience may arise by reason of the change in the form of government."] — 2 *Poore's Constitutions*, 219.

#### PASSAGES FROM THE CONSTITUTION OF COLOMBIA.<sup>1</sup>

*Title V. Art. 59.* — The President and the ministers, and in each particular transaction the President with the ministers of the respective departments, shall constitute the government.

*Title VII. Art. 81.* — No legislative Act shall become a law unless:

I. It shall have passed three readings and been adopted in each House, on three different days, by a majority of the members thereof.

II. It shall have obtained the approval of the government.

*Ib. Art. 83.* — The government, by means of its ministers, may take part in legislative debates.

*Ib. Art. 84.* — The judges of the Supreme Court shall be entitled to be heard in the discussion of bills relating to civil matters and judicial procedure.

*Ib. Art. 85.* — After a bill shall have passed both Houses, it shall be sent to the government, and if approved by the government, it shall be promulgated as a law.

[The President may return a bill with objections.]

*Ib. Art. 88.* — The President of the Republic shall approve, without power to present new objections, any bill which shall have been reconsidered and adopted by two-thirds of the members in each House.

*Ib. Art. 90.* — If a bill should be objected to on the ground that it is unconstitutional, it shall be excepted from the provision of Article 88. In this case, if the House insist, the bill shall pass to the Supreme Court, in order that this body, within six days, may decide upon its constitutionality. If the decision of the court should be favorable to the bill, the President shall give it his approval. If the decision should be unfavorable, the bill shall fail and be removed from the calendar.

*Title XV. Art. 151.* — The Supreme Court shall exercise the following functions . . . IV. To decide finally, upon the constitutionality of legislative Acts, which may have been objected to by the government as unconstitutional.

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<sup>1</sup> From the Supplement (January, 1893) to the Annals of the American Academy of Political and Social Science, in Philadelphia. Translated by Professor Bernard Moses. — Ed.



